

**THE ROLE OF A PROBATION OFFICER IN DIVERSION OF CHILDREN FROM THE
CRIMINAL JUSTICE SYSTEM: A PENOLOGICAL PERSPECTIVE**

By

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DECLARATION

I, **Cynthia Dlamalala**, declare that **‘The role of the Probation Officer in diversion of children from the Criminal Justice System: a penological perspective’** is my own work and all sources used or quoted have been indicated and acknowledged by means of complete references.

SIGNATURE

DATE.....

C Dlamalala

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EXECUTIVE SUMMARY

Children are the most vulnerable group. Their protection should be a priority for society. In particular, those who are accused of committing crime need to be protected from entering the criminal justice system and measures should be put in place to prevent the stigmatisation associated with having a criminal record. Such protection is endorsed by section 28 of the Constitution of the Republic of South Africa (1996). This study outlines the role played by a probation officer in the diversion process. This was achieved by examining international and national instruments that promote the protection of children in conflict with the law. The Child Justice Act No. 75 of 2008 forms part of national instruments. It provides guidelines for probation officers and other stake holders in the justice system on how to deal with children who are accused of committing crimes. Recommendations on the identified challenges and gaps are made.

KEY TERMS

Child, juvenile, youthful offender, probation officer, diversion, Criminal Justice System, Juvenile Justice, Child Justice, the “best interest of the child”, Children in conflict with the law.

LIST OF ABBREVIATIONS

APCOF	African Policing Civilian Oversight Forum
CJA	Child Justice Act 75 of 2008
CPA	Criminal Procedure Act
DCS	Department of Correctional Services
DipHE	Diploma of Higher Education
FGC	Family Group Conferences
IMC	The Inter-ministerial Committee on Young People at Risk
JDLs	United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty
LSP	Life Skills Programme
MGECW	Ministry of Gender Equity and Child Welfare
MYNSSC	Ministry of Youth, National Service, Sport and Culture
NICRO	National Institute for Crime Prevention and Reintegration of offenders
NPA	National Prosecuting Authority
PTCS	Pre-Trial Community Service
PQiP	Professional Qualification in Probation
SALRC	South African Law Reform Commission
SAPS	South African Police Service
SCA	Supreme Court of Appeals
UNCRC	United Nations Convention on the Rights of the Child
VOM	Victim-Offender Mediation
YES	Youth Empowerment Scheme
YOT	Youth Offending Teams

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CHAPTER 1: THE RESEARCH

1.1 BACKGROUND

The history of the criminal justice system indicates that its focus has been to imprison all offenders, without exception, as the main form of punishment. Protecting children against abuse and victimisation was not a priority. Thomson (2016:10) reiterates that before the 18th century, a young offender was treated in the same manner as an adult - with no special privilege. Young offenders were also subjected to the same procedures and sanctions as adult offenders. During the 19th century, there was a paradigm shift where young people were afforded the emergence of a trend. In this sense, the approach focused on the treatment, as opposed to punishment, of children by taking into account their social backgrounds and collaborating with various professionals towards a solution.

- The 2012/13 annual report by the Department of Correctional Services shows that there were more than 11 000 offenders in custody and more than a third of those incarcerated were youth, including children as young as 17 years old, who have committed serious crimes. In the light of this, national and international instruments have advocated for, and endorsed, the protection of children and young children in conflict with the law. These instruments include, among others, the Constitution of the Republic of South Africa (Act 106 of 1996), the United Nations Convention on the Rights of the Child, the Child Justice Act No. 75 of 2008, and other international instruments which are discussed later in the study. At the core of these instruments is the risk of incarceration of children. They also share a common vision to protect all children who are accused of crimes by placing what is best for the child as paramount importance. Furthermore, detain children as a measure of last resort for the shortest appropriate period. The Child Justice Act No. 75 of 2008, which was

promulgated in 2010, was developed as a tool to translate this common vision into a reality for South African children (<http://www.communitylawcentre.org.za>).

Thomson,(2016:41) explains that the Preamble to the Child Justice Act acknowledges that crime is a challenge in the country and requires robust prevention approaches to promote programmes which will enhance rehabilitation and reintegration of children in the community. Intention of the Child Justice Act is to create a distinct practical justice process which focuses on values of restorative justice and the advancement of techniques to prevent crime for the purpose of precluding children from entering the formal justice system.

However, Skelton and Courtenay in (Winterdyk, 2015:339) reflect that the Act faced numerous implementation challenges during its early stages. Although diversion was practised before, it was not legislated. In essence, diversion, in terms of the CJA, can also be regarded as a new phenomenon in South Africa. Borne from Child Justice Act, diversion has been embraced in order to address the overwhelming increase of children in conflict with the law. The Act outlines detailed operation guidelines by creating an enabling environment which facilitates responsive intervention as soon as a child is accused of committing crime. Any intervention has to take place before a child enters the formal criminal justice process so as to prevent the child getting a criminal record, which would damage the child's future. The key role player in this process is the probation officer. However, a decision to divert a child depends on the merits of each case which are determined through extensive interaction between the probation officer, the accused child and other role players.

The diversion process does not necessarily translate to ignoring the child's wrongdoing but rather seeks to protect the child, while also instilling a sense of responsibility and ownership to a child. If it has been established that a child has violated the law, there should be consequences that will enable the child to take full responsibility for his or her

actions. The Act caters for community-based sentencing as an alternative tool to sentencing of youth in trouble with the law. The ultimate goal is that a child should restore the damage caused to the victims and the community. It has already been mentioned earlier that diversion is a new concept in South Africa, which makes the role of a probation officer even more difficult given the increasing number of children who have committed offences, including children who are as young as seven years old. According to Boezaart (2009:656), the National Institute for Crime Prevention and Rehabilitation of Offenders (NICRO) pioneered the introduction of diversion services in South Africa.

Todres, Wojcik and Revaz (2006:208) in Article 20 of the United Nations Convention on the Rights of the Child (UNCRC) put emphasis on the rights of children who may become separated from their families owing to various circumstances and that such children are eligible to both security and support by the state. Boezaart (2009:658) further posits that the Child Justice Act provides for the diversion process to take place in three ways namely: “firstly, through prosecutorial diversion of children charged with schedule one offences; secondly, a child may be diverted at the preliminary inquiry, and finally, if not yet diverted, a child may still be diverted at the child justice court before the finalisation of the case”. The purpose of this process is to ensure that every decision benefits the child.

Probation officers play an integral role in this process since their recommendations, which are based on in-depth consultations with the affected individuals, can determine the future of the child. In South Africa, a probation officer is any individual who is appointed in terms of Probation Services Act No. 116 of 1991, while internationally, the intake officer is described as a person who is usually a probation officer, or prosecutor, who decides whether the juvenile or the child will face an adjudication hearing or be diverted from the formal juvenile system (Carmen & Trulson, 2006:21). If a probation officer or intake officer decides that the juvenile should formally be charged, the probation officer will recommend that a petition be filed and the case will be referred to

juvenile court prosecutor. However, before a probation officer decides whether to petition the case or divert the juvenile or child from the criminal justice system, several factors must be taken into account such as the seriousness of the offence, previous convictions, age of the accused, and harm inflicted on the victim (Taylor, Fritsch & Caeli, 2004:265).

Many children who commit crime grew up in broken homes and in families with relationship problems. Others were either been abused, neglected or come from a poverty-stricken environment (Martin, 2005:141). In most cases, children become rebellious and perpetrators of violence owing to circumstances which are beyond their control. On the contrary, parents also fail to protect their children by putting their children's lives at risk. Thomson (2016:8) asserts that two-thirds of children in South Africa are affected by high poverty rate, with two-thirds of families earning a monthly income of less than R1 200. As such, youth criminality continues to infiltrate South African society.

According to Carmen and Trulson (2006:112), a decision whether or not to divert the juvenile from the formal justice process occurs after the victim, juvenile and parents are consulted. If a juvenile or child is diverted formally he/she will be subjected to various diversion programmes. Diversion of children from the criminal justice system seeks to protect children from deeper involvement in crime and criminal activities by granting such children a second chance to becoming law-abiding citizens by choosing the right path. Diversion is also a way of protecting children from abuse and victimisation by inmates in correctional facilities. It is, therefore, crucial to divert children especially first time offenders.

In all activities regarding children which are carried out by community, public and private institutions, a child's interest must always be a primary consideration as indicated in the (UNCRC). When a decision whether to divert or convict the child is made, it must always be in the best interest of the child (<http://www.communitylawcentre.org.za>).

However, the implementation of the Child Justice Act needs to be supported by all stakeholders in order to promote its effectiveness.

The study explored the crucial role played by the various role players, with the parole officer as a central figure, within the process of diverting children from the criminal justice system. To achieve this, research on various bodies, which supports the notion of putting children first such as the Constitution of the Republic of South Africa, the United Nations Convention on the Rights of the Child (UNCRC), and the Child Justice Act No. 75 of 2008 among others, have been explored and mentioned earlier. On completion of the research, children's rights, various diversion programmes and the role of the probation officer in the diversion process should be explicit.

1.2. PROBLEM STATEMENT

Previously, the trend was to simply remove the offender from society and imprison him/her for the duration of his/her sentence with limited or very little intervention. The government of the Republic of South Africa made major paradigm shift in towards protecting children accused of criminality from entering the criminal justice system. While the protection of young people has taken priority in South Africa, the reality is that to this end there are still children who are in custody whether in remand detention or serving sentence of imprisonment. This status quo calls for more efforts on interventions and diversion options to avoid criminal records against children, which will subsequently lead to stigmatising the child.

The damage caused by incarcerating children cannot be underestimated especially taking into account the conditions of the police cells, correctional centres and other places of safety. The Department of Correctional Services has youth correctional centres to accommodate young offenders under 21 years old including children below 18 years. The aim is to separate children from adult offenders. However, due to

overcrowding in these correctional facilities, the separation of children from other categories of offenders is often not practical even though it is a child's right, as is enshrined in Section 28 of the Constitution. These rights include, among others, incarcerating a child only as a last option, for the shortest suitable duration, and to be separated from incarcerated offenders above 18 years old. While embracing the notion of child protection, it should also be acknowledged that diversion is a new phenomenal in South Africa that still needs to be researched. Although it had its own challenges at the beginning, the implementation of the Child Justice Act has brought about changes in the criminal justice system. Unless all stakeholders heed the call to fight this anomaly with an understanding that children are our future, the possibility of our future leaders becomes blink in our country.

Children commit crime for various reasons such as poverty, neglect, peer pressure, curiosity, and lack of guidance to mention a few. To ensure that a holistic picture is drawn towards a child's well-being, stake holders within the criminal justice system must work together with community and families to ensure that every decision is made to benefit the child. Lack of parental as well as insufficient community involvement in the lives of children shows signs of ignorance and lack of interest towards the well-being of children and thus deprives children of their basic human rights as enshrined in the Constitution of the Republic of South Africa (1996). The criminal justice system's approach in dealing with children who are accused of crime attempts to involve all parties in a child's well-being and to act in the child's best interest. The role of a probation officer takes a centre stage in this context. The probation officer is expected to work together with all affected parties in the child's life and make recommendations and informed decisions, which are favourable to a child.

1.3. OBJECTIVES OF THE RESEARCH PROJECT

The main objectives of this research are:

- To discuss the criminal justice system in different countries including South Africa
- To explain the development of juvenile justice internationally and in South Africa
- To explore the Child Justice Act No. 75 of 2008
- To discuss diversion as an alternative to incarceration
- To describe the role of a probation officer in the diversion process

The research study consists of six chapters as indicated below in an endeavour to achieve the stated objectives, and to clarify the role of the probationer in the diversion process:

- Chapter 1 addresses the background to the problem, objectives, rationale for the study, and the methods employed and the terminology used in the study are also explained.
- Chapter 2 explores the criminal justice process nationally and internationally
- Chapter 3 explains the juvenile justice in different countries. The Child Justice Act and its process is explained.
- Chapter 4 discusses diversion as an alternative to incarceration. The role of non-governmental organisations (NGOs) in the diversion process is explored.
- Chapter 5 describes the role of a probation officer in the diversion process. Other significant role-players in the diversion process are discussed.
- Chapter 6 concludes the study and makes recommendations for further research.

1.4 MOTIVATION FOR THE RESEARCH

1.4.1. Scientific Value

The incarceration of children has been a societal problem for many years. It is even more concerning that the profile of children in trouble with the law is the increase in children committing serious offences. According to sentencing guidelines, this state of affairs would indeed warrant that harsh imprisonment sentences be imposed based on the nature of these crimes. However, considering their age and the conditions under which they are exposed to while incarcerated, children do not belong in prison. Highlighting the crucial role of the probation officer and the recommendations made by the researcher will assist key role players in the criminal justice system to make decisions that will be in the best interest of the child.

1.4.2. Value to Society

The research may be valuable to society by understanding that children who are in conflict with the law belong to communities in society. As such, the criminal justice system requires society's support in ensuring the protection of children from any form of criminal activities and exploitation. Understanding the dangers of using and encouraging children to commit crimes can assist communities build a better future for children thus creating an environment which enables and frees communities from fear of being prisoners in their own homes. The probation officer can never succeed in the fight of protecting children without societal commitment. This study is aimed at highlighting, the role of a probation officer, and the various roles and responsibilities expected from society and the criminal justice system in an effort to protect children from landing behind bars.

1.4.3. Value for the Administration of Children in Conflict with the Law in South Africa

In South Africa, research on diversion of children from the criminal justice is a fairly new concept. As such, there is a need for research in this area to explore numerous possibilities to prevent children from having criminal records and to find ways that will assist these children to have meaningful lives. Understanding and supporting the role of probation officers can add value to different components of the criminal justice system especially when bearing in mind the terrible conditions in police cells and overcrowding in youth correctional centres.

1.5 DEFINITION OF KEY CONCEPTS

1.5.1 Child

Section 28(3) of the Constitution of the Republic of South Africa, 1996 defines a child as a person under the age of 18 years. The Children's Act (38 of 2005) also defines a child as a person under the age of 18 years. According to Vadackumchery (2005:360), a child means a person who has not attained the age of 18 years.

1.5.2 Juvenile

Carmen & Trulson (2006:13) refer to a juvenile as any individual who is below 18 years old. Robertson (2010:3) describes a juvenile as a person who is not yet considered an adult, while Mays and Winfree (2006:399) define a juvenile "as people who have not reached their majority ages of 18 to 21 depending on state and law".

Taylor et al (2007:6) define juvenile as "an individual who falls within a specific age range and is subject to the jurisdiction of the juvenile court and the most common

maximum age of a juvenile is 17 years". The word "juvenile and a child" will be used interchangeable throughout this study.

1.5.3 Probation Officer

In South Africa, a probation officer is "a qualified social worker who is appointed as a probation officer under Section 2 of the Probation Services Act (116 of 1991). According to Taylor et al (2007:263), a "probation officer is defined as a person who performs intake screening to determine whether the case will be handled formally or informally by the juvenile justice system". Mays and Winfree (2006:171) define probation officers as persons who serve as juvenile courts intake decision makers by collecting information that will enable the court to decide whether the case is appropriate for formal juvenile court disposition or not. Hess and Drowns (2005:305) also define probation officers as intake officers who make recommendations to the court whether to move ahead for court processing or to release the juvenile to the parents with a warning or reprimand.

1.5.4. Diversion

Carmen and Trulson (2006:469) define diversion as a process of "diverting youths from the formal juvenile justice system by offering them an informal way to resolve their delinquency referral".

According to Hess and Drowns (2004:343), diversion is described as "the court's decision to permit children to remain with their parents or guardians subject to specific conditions and limitations based on clear and convincing evidence that a child is deprived or in need of treatment or rehabilitation". Also in Hess and Drowns (2004:61), diversion is defined as "the official halting of juvenile proceedings and referral of the juvenile to a treatment or care programme".

1.5.5 Intake

Intake refers to “the first stage of juvenile court proceedings in which the decision is made whether to divert the referral or file a petition in juvenile court” (Bartollas, 1990:542). According to Carmen and Trulson (2006:470), intake is defined as a “screening process of all delinquency referrals after arrest to determine which cases will be informally adjusted and which cases will be petitioned to the juvenile court”.

Martin (2005:400) defines intake as a process used to determine whether a juvenile should be released or processed through the juvenile justice system, while Hess and Drowns (2004:557) define intake as the point in the juvenile justice process that reviews referrals to the juvenile court and decides the action to be taken based on the best interest of the child. Taylor et al. (2007: G-5) define intake as the “procedure by which juvenile court staff decide whether to process the case further in court, handle the case informally or dismiss the case”.

1.6 RESEARCH METHODS

1.6.1 Research design

According to Babbie and Mouton (2001:72) research design is a plan used as a guide to an investigation in order to find out something. Terre’Blanche, Durrheim and Painter (2007:34) describe a research design as plans that guide the procedure on how data collection and analysis should be followed.

Different studies use different methods and techniques that must be appropriate to the aims of the study (Welman & Kruger, 1999:2). For the purpose of this study, a qualitative research approach was selected.

1.6.2 Methodological design

1.6.2.1 Qualitative research

According to Remler and Van Rayzin, (2011:56-57), “qualitative research can be defined in terms of the data it produces and in terms of the form of analysis it employs”. Qualitative research involves various kinds of nonnumeric data such as interviews, written texts or document, visual images, observation of behaviour and case studies. Qualitative research methods assist in evaluating and understanding unquantifiable facts about actual people using literature, poetry, photographs, letters, newspaper accounts, and diaries (Repko, 2012:209).

Sarandakos (1988:51) highlights that qualitative researchers use less structured techniques of data collection and analysis; participant observation as the most commonly used method. Their emphasis is on discovery and exploration rather than on hypothesis testing.

According to Babbie and Mouton (2001:309), qualitative research distinguishes itself from quantitative research in terms of the following key features:

- Research is conducted in the natural setting of social actors.
- Qualitative research emphasises process rather than outcome.
- The actor’s perspective (the “insider” or “emic” view) is emphasised.
- The primary aim is in-depth descriptions and understanding of actions and events.
- Understanding social actions in terms of its specific context (idiographic motive) is more important than attempting to generalise to some theoretical population; the research process is often inductive in its approach, resulting in the generation of the new hypotheses and theories.

- The qualitative researcher is always seen as the “main instrument” in the research process”.
- The probation officer plays the most crucial role in assessing unique circumstances of each child who is accused of crime and makes recommendations which will assist the court to make an informed decision whether to divert or to formally charge the child. The literature survey has enabled the researcher to have a better understanding of the role of a probation officer in dealing with the child in conflict with the law.

1.6.2.2 Exploratory Research

The purpose of exploratory research is to determine whether a phenomenon exists or not, and to gain familiarity with such a phenomenon (Welman & Kruger, 1999:19).

Babbie and Mouton (2001:79) accentuate that a large proportion of social research is conducted to explore a new topic or when the subject of study itself is relatively new. The exploratory nature of a qualitative research leads to the development of new concepts or theories. The researcher take notes and considers alternative interpretations of the data (De Vos, 2002:357). According to Terre'Blanche, et al. (2007:45), exploratory studies are used to make preliminary investigations into relatively unknown areas of research and employ an open, flexible, and inductive approach to research as they attempt to look for new insights into phenomena.

Exploratory research was conducted prior to the study in order to have a better understanding of the phenomenon.

1.6.2.3 Population

According to Welman, Kruger and Mitchell (2013:52), population refers to the study of objects and comprises individuals, groups, organisations, human products and

events or conditions to which they are exposed. This also includes all unit of analysis about which the researcher wishes to make specific conclusions.

Since the best interest of the child is always paramount, diversion programmes that the probation officer can recommend are covered in the study.

1.6.2.4 Sampling

Sarantakos (1988:139) explains sampling as the process of choosing the units of the target population which are to be included in the study. Powers et al.,(1985:235) in de Vos (2002:198) assert that we are interested in describing the sample not primarily as an end in itself, but rather as a means of helping us to explain some facet of the population. According to Terre'Blanche, et al. (2007:49) define sampling as the selection of research participants from an entire population and involves decisions about which people, settings, events, behaviours and/or social processes to observe.

The role of a probation officer in this study will only include children who are accused of crime but have not yet entered the criminal justice system.

1.6.2.5 Data collection

In order to conceive the research topic in a way that permits a clear formulation of the problem, some background information is necessary. This is obtained mainly by reading whatever has been published that appears relevant to the research topic (Bless & Higson-Smith, 2004:20-21).

The researcher has made a thorough consultation of South African and international sources on the subject such as books, journals, articles, relevant legislation such as the Constitution of the Republic of South Africa, the Child Justice Act No. 75 of 2008, Children's Act No. 38 of 2005, and the UN Convention on the Rights of the Child.

- **Primary data**

According to Terre'Blanche, et al. (2007:316), "documentary sources such as letters, newspapers, articles, official documents, and books can be useful in all forms of qualitative research". A literature review has assisted the researcher to gain more insight on the chosen research topic.

- **Secondary data**

Secondary analysis refers to the analysis of data collected earlier by other researchers for various purposes other than the topic of the current study (Babbie & Mouton, 2001:266). Various sources were consulted for more in depth understanding on the research topic.

1.6.2.6 Data analysis

Babbie and Mouton (2001:101) refer to data analysis as the interpretation of the collected data for the purpose of drawing conclusions that reflects on the interests, ideas and theories that initiated the inquiry.

Creswell (2006), in Remler and Van Rayzin (2011:75), highlights the following three steps in qualitative data analysis:

- Preparing and organising the data
- Reducing and summarising the data
- Presenting the data in a narrative form, figures or tables.

The researcher has also followed the above three steps to analyse data. All the information which has been gathered throughout this research will be summarised in order to present findings and recommendations.

1.7 VALIDITY AND RELIABILITY

Reliability is a matter of whether a particular technique, applied repeatedly to the same object, would yield the same result each time (Babbie & Mouton, 2001:119). A literature review was done to gain insight on the latest developments of the subject. Primary and secondary sources were consulted. In most cases, the reliability of measurement is the degree to which that instrument produces equivalent results for repeated trials (Bless & Higson-Smith, 2004:126) whereas Babbie and Mouton (2001:265) acknowledge the advantages of secondary data, they also mention that validity cannot always be guaranteed.

1.8 CONCLUSION

Diverting children from the criminal justice system is the most desired approach in every society since it is undertaken in the best interest of the child. The crucial role played by the probation officer and the commitment of all relevant role players can assist in preventing children from becoming hardened criminals and to achieve the goals of the Child Justice Act. It is a common knowledge that children do not belong in prison, but owing to the seriousness of the crimes, they commit the sentence of imprisonment may become inevitable. This not an ideal situation as it has already been attested by other researchers in the field. More effort is required from community, families and other stake holders in the justice system to ensure that children are incarcerated as a measure of last resort and for the shortest applicable duration. Any decision whether to divert the child must be taken in the best interest of the child. Therefore, the role of a probation officer always entails striving for the well-being of children.

CHAPTER 2: GENERAL OVERVIEW OF THE CRIMINAL JUSTICE SYSTEM

2.1 INTRODUCTION

This chapter provides an outline of the criminal justice system both internationally and in South Africa. Criminal justice is a complex field or entity. Owing to its complexity, different conflicting perspectives exist on how it should operate or is expected to operate in order to prevent crime. The criminal justice system consists of government institutions responsible for the enforcement of criminal law. The common goals of the criminal justice system globally are to control crime, prevent individuals from committing crimes and imposing punishment to those who break the law.

However, it is imperative to appreciate that the state comprises three different but interrelated components, namely, legislative, judiciary and corrections. Therefore, all parts of this system need each other and must work together to achieve a common goal to prevent crime. These three components are cornerstone for the rest of the chapters in this study. The objective of this research is based on the diversion of children who are in conflict with the law from the criminal justice system and the role of a probation officer in this process.

Therefore, the criminal justice system becomes a fundamental point of departure for the rest of the study. In essence, all the chapters form part of the criminal justice system. This chapter explores the three components of the criminal justice and how they are interlinked. Thus, the criminal justice system is the umbrella body, which consists of different components. Discussing the criminal justice system will provide a synopsis of the rest of the chapters. Different punishment theories that are imposed on those who violate the law will be explored. The criminal justice system in South Africa and

internationally will be discussed. Components and the process of the criminal justice will be explained.

2.2 FUNDAMENTAL OBJECTIVES OF THE CRIMINAL JUSTICE SYSTEM

No society can survive without laws. These laws are designed to protect society against the ills of crime. There is a high expectation for fair, effective and efficient approaches in the fight against crime. Role players such as the police, courts and corrections are expected to play their role in protecting the public. Samaha (1988:6) views the criminal justice system as an interactive, interrelated, interdependent group of elements performing related functions that make up a complex whole. Reid (2012:4) explains that the criminal justice system is designed to deter people from violating rules and to impose legal punishment on those who do.

Anderson and Newman (1998:22) state that there is a general agreement that the primary objective of the criminal justice is crime control, crime prevention and the maintenance of public order. Contradictory ideas emanate from differing views and expectations on the best methods to achieve these objectives. Senna and Siegel (2002:20) provide a clear picture of these different viewpoints;¹ however, the undisputed fact is that the criminal justice system is charged with the most critical responsibility of protecting the public by controlling crime, preventing crime and bringing the guilty to justice (Muthaphuli, 2012:25).

¹ Senna and Siegel (2002), Introduction to Criminal Justice: Perspectives on criminal justice, 19.

2.2.1. Crime Control

According to Muthaphuli (2012:23), the purposes of criminal justice are greatly debated; however, the primary goal of a criminal justice system in a free society is to protect the members of that society. Therefore, the criminal justice system components play a crucial role in controlling crime. When an accused person is apprehended, prosecuted, convicted and punished, the criminal justice system is serving the purpose of crime control. Although each component is independent, they are still interrelated because what one component does affects all the others. For example, when the police arrest more people, the courts will have to process more accused persons, which will translate into a larger workload. Correctional facilities will accommodate more offenders, which may result to overcrowding (Samaha, 1988:6).

Senna and Siegel (2002:25) stress that crime infuriates. Subsequently, they demand a more efficient and effective justice system that will impose tough sanctions on those who choose to violate the law. Society believes that if the criminal justice system becomes more effective and efficient, potential criminals would be deterred from committing law violations. Crime control advocates attribute reductions in the crime rate to a “get tough” attitude toward crime, which has resulted in mandatory punishments and expanding prison populations. Although crime control may be expensive, reducing the pains of criminal activity is well worth the price.

2.2.2 Prevention of crime

It has already been mentioned in par.2.2.1 above that crime control means taking action against lawbreakers. However, while controlling crime, the criminal justice system has an obligation to prevent crimes from happening. Anderson and Newman (1998:23) suggest that while crime control deals with the immediate situation, crime prevention focuses on the crimes that may be committed in future. Therefore, crime prevention involves prevention strategies to deter offenders from committing further crimes.

Various ways of crime prevention include the deterrent effect of patrols and arrest by police, conviction by courts and rehabilitation by corrections. This process focuses on punishing those who violate the law, and prevent individuals from committing crime in future.

However, as much as the actions of criminal justice are crucial in this process, citizens also have a role to play. They are expected to take necessary steps in protecting themselves and their properties. In addition, since crime happens in communities, citizens have a responsibility to report crime and to expose criminals instead of harbouring them (Muthaphuli, 2012:25). Crime control and crime prevention are intertwined, for example when police use force, it becomes a control issue, while the show of force in future is directed and preventative in nature (Anderson & Newman, (1998:22).

2.2.3 Administration of Justice

Justice is seen to prevail when perpetrators are punished for the crime they committed. However, the application of punishment must be proportionate to the seriousness of the crime committed. Importantly, justice must be based on the rules and prescripts of the criminal justice system. Otherwise, without the principle of justice, there will not be fairness in the system (Muthaphuli, 2012:23). Senna and Siegel (2002:24) advise that the reduction of discretionary powers within the criminal justice system should be limited. Unlimited discretionary powers lead to unequal and unfair treatment. The application of justice must be fair and without prejudice. Therefore, equality in the eyes of the law should prevail.

2.3. DEFINITION OF CRIME

According to Low (1990:1) crime can only exist if there is a conduct or behaviour. The conduct can be an act or an omission in cases where a legal duty to act is expected. Reid (2012:4) suggests that the criminal justice system is designed to deter people from violating rules and to impose legal punishment on those who do. If that is the case, it is crucial to define the meaning of crime and the relationship between crime and punishment.

Scheb and Scheb (2002:4) define crime as a wrongful act explicitly prohibited by the criminal law. In terms of the criminal law, the wrongful act is called *actus reus*. Failure to take action where the law imposes a duty to take action can be considered a wrongful act. Skelton (1998:16) defines a crime as any human behaviour that is clearly defined and also punishable by law. However, a crime must always consist of two elements in order to constitute a crime. These elements are a criminal act, called *actus reus*, and criminal intent, known as *mens rea* (Rigoli, Hewitt & Maras 2013:32). These elements will be discussed in the following section.

2.3.1 The Elements of Crime

Anderson and Newman (1998:8) concur with Low (1990:1) that crime or punishment only exists if a specific law prohibits a behaviour and that particular behaviour is punishable by law. Therefore, no one can be charged if his/her act does not violate the criminal law. Snyman (1995: 49) summarises the elements of crime as follows:

2.3.1.1 A Criminal Act

According to Snyman (1995:51), there must be the principle of *actus reus*, which means a wrongful human act must exist. Therefore, a person can be punished if the crime was actually committed. This means that people cannot be punished for their thoughts, if

they do not act on them. Hence, a crime requires an act - a specific act of commission or omission by a person. For example, a person stabs and kills someone. Stabbing is a wrongful act and the intention of stabbing a person is to hurt or kill that person. Reid (2007:41) also endorses that damage or harm must be caused by an act before the act can be considered as a crime. An omission happens when one fails to act when the law requires him/her to act.

2.3.1.2 A Criminal Intent

Snyman (1995: 52) further explains that intention, called *mens rea*, is always part of a prerequisite of an act. This is because an act or the omission of an act alone is not sufficient to constitute a crime. The act must be a human act committed by a human being. Rigoli et al (2013:32) reiterate that an act alone cannot make a person guilty, meaning that there must be a guilty mind. Low (1990:1) mentions two types of intent, namely: specific intent and general intent. Specific intent requires that an individual has planned to commit the crime before he/she actually commits such criminal act. General intent refers to either recklessness or negligence in the sense that a person could have been aware of the risk that an element of crime will occur. Samaha (1988:35) argues that reckless people intentionally or unintentionally create a high risk of harm. Some will be reckless hoping that their recklessness will not harm anyone, but they risk causing harm anyway.

2.4 COMPONENTS AND PROCESSES OF THE CRIMINAL JUSTICE SYSTEM

The criminal justice system consists of three components that are responsible for the enforcement of criminal law. These components comprise the legislative, judiciary and corrections. The legislative component creates laws, while the judiciary applies the law in the courts by imposing punishment on those who are guilty of violating the law.

Corrections consist of prisons or correctional facilities that accommodate and rehabilitate offenders (Senna & Siegel, 2002:5). Samaha (1998:309) further reinforces that the police, courts and corrections are key role players in the criminal justice. However, there are other equally important role players such as prosecutors and probation officers. For the purpose of this study, this section will focus on these three components.

These distinct components function collectively with the aim of maintaining the rule of law within society. All the components in the criminal justice system share certain common goals, as they collectively coexist. These goals are to protect society, maintain order and prevent crime. However, in their own unique way, they also contribute individually towards those goals (Muthaphuli, 2008:28). Rigoli et al (2013:13) outline the functions of each component in the following section:

2.4.1. Police

The process of the criminal justice system starts when a crime is reported to the police. The police will investigate any suspected transgression and make an arrest. Police have powers to carry out searches and to arrest and question suspects in the process of their investigation. For most people, their initial contact with the criminal justice system begins with the police. The police may witness the crime or someone reports the crime to the police. This is followed by arrest or investigation by police (Schmallegger, 2001:16).

Besides arresting suspects, police play a crucial role in the community. While police involvement in communities may differ from country to country, the common objective globally is crime prevention. Muthaphuli (2008:28) describes police involvement in the community in the form of prevention programmes. These programmes may include activities such as delinquency prevention programmes, which reduce the likelihood of youth involvement in criminal activities. Police are also involved in educational

programmes to equip citizens with skills to protect themselves from the perpetrators of crime. The main role played by the police is to protect the community from perpetrators of crime (Muthaphuli, 2008:28). Although people are expected to feel safe and protected when police are around, sometimes the opposite occurs owing to previous unpleasant experiences with the police.

Champion (2007:244) encourages the police to focus on youth issues as an indication of creative solutions in the fight against crime. It is every country's dream to experience police working together with the people in order to improve the quality of life in the community. It is also comforting for the community to see the police not only as law enforcers, but also as advisors and supporters. However, Anderson and Newman (1998:90) state that the criminal justice process begins as soon as the police receive information that a crime has been committed. The police at this stage have to determine whether a crime has been committed. Once the police conclude that a crime has been committed and sufficient evidence is gathered, this will lead to the arrest of the accused. The gathered information is submitted the court for prosecution.

2.4.2 Courts

The courtroom is the most orderly and formal environment in the criminal justice system. People are compelled to visit the court as either accused persons, victims, or witnesses in crime. Senna and Siegel (2002:274) describe the court as a complex social agency with many independent but interrelated subsystems. Each of these subsystems has a role in the manner in which the court operates. These active role players are the police, prosecutors, defence attorneys, judges, and probation officers. Anderson and Newman (1998:22) state that because the court system is independently operated, its process differs from country to country.

Muthaphuli (2012:29) outlines the four significant functions of the court as follows:

- Firstly, to protect the rights of the accused. The courts are a neutral role player and are obliged to objectively assess the actions of the police and ensure that the accused's rights have not been violated. The courts also evaluate the actions of other role players in the entire criminal justice system to ensure that the rights of the convicted person are not violated (<http://www.uir.unisa.ac.za>).
- Secondly, the courts are responsible for analysing all the evidence presented, to determine whether it meets the prescribed guidelines.
- Thirdly, the court has a duty to protect society by ensuring that a person who is found guilty is removed from the society and incarcerated (<http://www.uir.unisa.ac.za>).
- Fourthly, the courts have to impose appropriate sentences to deter a convicted person from committing further crimes in future.

2.4.3 Corrections

Corrections is one of the most vital components in the criminal justice process. It is responsible for enforcing court orders. However, this component comes at the receiving end of the criminal justice. When the court sentences an offender to a term of imprisonment, corrections has to accommodate him/her. As a result, this leads to overcrowded facilities since corrections do not have control over the number of inmates who enter the system. Nonetheless, the Department of Correctional Services has a duty to protect members of society by keeping offenders in safe custody for such a duration as stipulated by the court (<http://www.dcs.gov.za>).

While incarcerated, offenders will have the opportunity to participate in rehabilitation programmes, and educational and recreational programmes. The purpose of these programmes is to provide offenders with an opportunity to become law-abiding citizens after release. Not all prisons provide inmates with the same programmes. In addition, since juveniles have special needs, they are treated differently from the other categories of offenders (Schmallegger, 2001:16).

2.5 THEORIES OF PUNISHMENT

“The central characteristic of criminal law is that a violation of the rule results in punishment before a court” (Lippman 2013:53). Every action and decision that an individual makes is bound to have consequences. However, consequences could be either positive or negative depending on the type of action or decision. The same applies to the rule of law. If an offence is committed, the perpetrator deserves to be punished. Muthaphuli (2012:70) reiterates that since crime disturbs moral and public order, penalty is necessary to restore stability. Punishment, therefore, is meant to discourage the offender from committing another offence. Snyman (1996:18) classifies punishment into three categories, namely, absolute theory, relative theories and unitary theories. Although there is only one absolute theory, which is retribution theory, there are a number of relative theories. Unitary theory is a combination of absolute and relative theories (<http://www.uir.unisa.ac.za>). These theories of punishment will be explored in the next section.

2.5.1. Retribution Theory

Snyman (2013:18) contends that according to absolute or retribution theory, punishment is an end in itself. It is of a retrospective nature and only focuses on the crimes that the offender committed in the past. Retributive theory is based on the principle that committing a crime disturbs the balance of legal order. The only way to restore such order is through punishment (<http://www.uir.unisa.ac.za>). Therefore, when an offender is punished for the crimes committed, order will be restored. In addition, a proportional relationship between the damage caused by crime and the punishment must exist. The more serious the crime, the harsher the punishment should be (Snyman, 1995:20).

Retribution or revenge can be traced back to biblical times where punishment was

based on the philosophy of “an eye for an eye, a tooth for a tooth” (<http://www.uir.unisa.ac.za>). Victims were expected to avenge the offender so that he/she could feel the same pain (Cole, 1983:354). Reid (2012:8) also reiterates that the philosophy of revenge or retribution can be traced back even further than biblical times. During those times, the death penalty was imposed for crimes such as possession of stolen goods, robbery and housebreaking. Fagin (2007:442) explains that the tradition of retribution, which was intended for a victim’s revenge, was a way of confirming that offenders must be held accountable for their crimes and deserve to be punished.

Retribution was designed to ensure that impaired justice could only be restored once the offender is punished. Furthermore, such punishment must also correspond with the crime and be proportionate to the nature of the crime committed (Muthaphuli, 2008:48). Senna and Siegel (2002:404) reiterate that according to this theory, an offender is punished because he/she deserves it.

2.5.2 Relative Theories

Snyman (1995:18) mentions three relative theories and further explains that “based on these theories, punishment is only a means to a secondary end or purpose”. However, the secondary purpose will always differ from one relative theory to the other. The first relative theory is the preventative theory. The second is the deterrent theory, and the third is the reformatory or rehabilitation theory. If, on the other hand, one follows a relative theory, one looks to the future: the emphasis is on the object, for example, prevention and reformation, which one wishes to achieve by means of punishment. Each of these relative theories will be discussed.

2.5.2.1 Preventive Theory

According to the preventive theory, the purpose of punishment is to prevent criminality. Prevention consists of two particular aspects: general prevention and individual

prevention or incapacitation (Snyman, 2013:19). Senna and Siegel (2002:402) state that general prevention is the integral aim of criminal law to prevent criminal activities. Whereas individual prevention that involves incapacitation are measures to prevent the individual offender from committing further criminal activities (<http://www.uir.unisa.ac.za>).

General prevention is aimed at discouraging people from committing crimes (Muthaphuli, 2012:73). However, Snyman (1995:20) cautions that since the purpose of punishment according to the preventative theory is to prevent crime, this theory can overlap with both deterrent and the reformatory or rehabilitation theories. Both these theories focus on the methods to prevent crime. Hence, it is of paramount importance that these theories should not be applied in isolation. Therefore, each theory must be applied in conjunction with others in order to obtain effective results.

2.5.2.2 Deterrence Theory

In the previous section, it was mentioned that based on the preventative theory, the purpose of punishment is the prevention of crime. While according to the deterrent theory, the purpose of punishment is to deter an individual or society from committing a crime. Therefore, individual deterrence means that an individual is punished for past crimes and deterred from committing further crimes. General deterrence means that the whole community is deterred from committing crimes (Snyman, 1995:21). Imposing a sentence of imprisonment to an offender might be a general deterrence to the community, as a signal that crime does not pay (Senna & Siegel, 2002:402).

The theory of deterrence is based on the idea that crime will be reduced because people would refrain from offending for fear of being apprehended and punished (Muthaphuli, 2012:76). Rigolli (2013:246) highlights that utilitarian philosophers believed that people are rational beings and as such, they become cautious when it comes to making choices especially if these choices will have either positive or negative

consequences. They believed that people would always prefer pleasure instead of pain. The mere fact that deterrence involves punishment is enough to prevent potential offenders from committing crime.

According to Fagin (2007:439), deterrence is based on the principle that punishment should prevent the criminal from re-offending. Such punishment includes economic sanctions, such as fines, and corporal punishment and the threat of bodily harm based on the premise that people seek pleasure and avoid pain. This means that human beings take actions that provide pleasure and avoid those that bring pain. Reid (2012:8) explains deterrence as punishment, which is imposed to prevent the offender from engaging in criminal acts. This is based on the assumption that the perpetrator would fear punishment, learn his/her lesson and refrain from criminal activities.

The purpose of deterrence is to discourage the offender from committing crimes in future. The notion behind deterrence is to provide the offender with practical effects of punishment, which will deter him/her from committing crimes in future. It is also crucial that the punishment must be very closely linked to the crime, so that potential offenders can relate to the punishment. If an offender commits murder, a long period of imprisonment is imposed and a message is sent to other potential offenders.

2.5.3 Incapacitation

According to Scheb and Scheb (2002:20), incapacitation forms part of specific deterrence aimed at preventing a person from committing further crimes. The purpose of incapacitation is to restrict a person's freedom of movement. Freedom of movement is restricted when an individual commits crime. The aim is to prevent an individual from committing additional crimes. Such restriction can be temporary or permanent. Incarceration is another form of restriction of movement. When offenders are incarcerated, they cannot commit crimes anywhere in the community. However, this cannot stop them from committing crimes inside the prison (Muthaphuli, 2008:48).

Reid (1993:9) explains incapacitation as it has been practiced in the past. This aim of punishment was to prevent the offender from committing further offences. If an offender, say for example, is a thief, he/she is incapacitated by cutting off his/her hands, gouging out the eyes of a spy, castrating rapists and disfiguring prostitutes to make them unattractive. In primitive societies, banishment from communities was often used to prevent a recurrence of forbidden behaviour. Presently, incarceration is still the most common mode of incapacitation to keep offenders under control and prevent them from committing further offences (Cole, 1983:357).

According to Fagin (2007:44), the theory of incapacitation assumes that offenders cannot be rehabilitated. As such, it will never be safe to release them back into society. In addition, Muthaphuli (2008:48) has already cautioned that incarceration may not deter an offender from committing further crimes while in custody. The only guarantee to incarceration is the certainty and peace of mind afforded to the, at least for the duration of the offender's incarceration.

2.5.4 Rehabilitation or Reformatory Theory

According to Snyman (1995:23), the third relative theory is the reformatory or rehabilitation theory. Here, the purpose of punishment is to reform the criminal. The reformatory theory is based on the premise that through punishment, the offender will be reformed into a law-abiding citizen once again. This theory is based on the future needs of offenders. According to this theory, the offender commits a crime because of psychological circumstances and an unstable background. The focus is always on the offender as an individual and not on the crime and its effects. Muthaphuli (2012:77). Asserts that the most important feature of this theory is that it recognises that an offender does not stop being a member of the community while incarcerated (<http://www.uir.ac.za>).

Rehabilitation is based on the belief that offenders are capable of changing their behaviour through appropriate treatment and care. Therefore, exposing offenders to treatment programmes improves their chances of positive behaviour. Cole (1989:357) refers to rehabilitation as the use of criminal sanctions to change an offender's behaviour through treatment. Fagin (2007:443) believes that rehabilitation and restoration are mere modern-day philosophies that define the purpose of criminal sanctions. Advocates of rehabilitation prefer approaches such as psychology, medical treatment, drug treatment, self-esteem counselling, education and other programmes aimed at developing ethical values and work skills.

According to Schmallegger (1994:222), rehabilitation seeks to bring about fundamental changes in offenders and their behaviour, with the ultimate goal of reducing the number of criminal offences. Rehabilitation is viewed as a tool to reduce re-offending and preparing offenders to become law-abiding citizens upon release to the community. Rehabilitation is also premised on the belief that people can change; therefore, punishment should focus on correcting the offending behaviour. Hence, it aims at restoring the criminal, through the provision of psychological or educational assistance, towards being a law-abiding citizen. The most important fact about rehabilitation is the hope it brings to offenders instead of fear (Muthaphuli, 2008:48).

2.5.5 The Unitary Theory

Snyman (1995:24) suggests all the different theories of punishment bear both negative and positive results. As such, the courts neither reject nor accept any single theory; instead, the courts apply a combination of all these theories. As a result, efforts have been made to incorporate these different theories into a single theory known as a unitary theory. Retributive theory remains the backbone approach to punishment. It embraces the principle of proportionality between punishment and the gravity of the offence. It also ensures that justice is served. However, all the theories are reconcilable in the sense that retribution deters both the offender and the community from

committing crime and thus prevents crime. While the preventive theory prevents the commission of crimes, generally retribution is one of the best ways of deterring people from committing crime (Snyman, 1995:25).

2.5.6 Sentencing

Sentencing is the most critical function of a judge. According to Schmallegger (2001:365), sentencing is the imposition of a penalty to an offender who has committed an offence. Sentencing takes place after the accused is found guilty of an offence. At this stage, the responsibility of the judge is to decide on the appropriate sentence. This is achieved by weighing up the offense and the characteristics of the offender that might increase or decrease the severity of the sentence. This is known as aggravating or mitigating factors.

According to Rigoli et al (2013:289), the type and length of sentence depends on the court's discretion, which is based on the sentencing guidelines provided by law. Anderson and Newman (1998:28.7) state that judges think differently and they exercise their discretion differently. This might lead to a judge being seen as discriminatory or suspected of prejudicial treatment. Nonetheless, the responsibility of sentencing is often more complex and difficult. Muthaphuli (2012:85) highlights that one of the fundamental goals of any sentencing system is to avoid unjustified disparities by ensuring that consistency is maintained.

2.5.6.1 Indeterminate Sentencing

Indeterminate sentencing prescribes the minimum and maximum period that an offender should serve in prison. This type of sentencing has certain conditions that the offender must adhere to such as participation in rehabilitation programmes or compulsory education in case of children. Rigoli et al (2013:249) mention that the parole board may release an offender after serving a portion of the minimum sentence.

The release is on condition that he/she complies with the conditions as stipulated by the court and the parole board. The aim of indeterminate sentences is to ensure that the offender is rehabilitated and becomes a law-abiding citizen after release.

2.5.6.2 Determinate Sentencing

Determinate sentence means that an offender is sentenced to a fixed imprisonment term. The judge specifies the period in which an offender should be incarcerated. The offender's behaviour plays a critical role in determining points based on good behaviour and can be accumulated towards a reduction of prison sentence (Senna & Siegel, 2002:409). Furthermore, Schmallegger (2001:370) juxtaposes that determinate sentencing differs from indeterminate sentencing in that the anticipated release date is specified. However, according to the indeterminate sentencing approach, offenders are uncertain of the time they will spend in prison.

2.5.6.3 Presumptive Sentencing

According to Rigoli et al. (2013:251), presumptive sentencing relies on a range of minimum and maximum terms of incarceration issued by legislature, which a judge can use to determine the prison term for a particular crime. Judges are allowed to adjust a sentence depending on the presence of either aggravating or mitigating circumstances. The aim of the presumptive sentencing approach is to reduce sentencing disparities in order to promote a fair justice system (Muthaphuli, 2012:90).

2.5.6.4 Mandatory Sentencing

Mandatory sentencing refers to a specified imprisonment term applicable to certain crimes and specific categories of offenders. Mandatory sentences prohibit judges from imposing suspended sentences or placing offenders on parole. This is an effort to limit judiciary discretions and to reduce disparities in sentencing (Senna & Siegel, 2002:413).

Schmallegger (2001:374) refers to mandatory sentencing as a form of structured sentencing that does not accommodate deviations from the set punishment for specific offences. Pertaining to mandatory sentencing, Lippmam (2013:56) attests that legislation compels judges to impose a prescribed sentence to an offender regardless of any aggravating or mitigating circumstances.

2.6. CRIMINAL JUSTICE SYSTEM IN SOUTH AFRICA

The Constitution of the Republic of South Africa is the foundation upon which the criminal justice system is based. The Constitution seeks to protect all persons within the Republic and the Bill of Rights, which is the fundamental part of the Constitution, emphasises the protection of each individual against the abuse of power by the State. Therefore, the Constitution was designed to provide a system of human rights that were previously denied to some citizens or was not entrenched in law (Snyman, 1995:14). It sets core values for the criminal justice system and guides the courts in interpreting and implementing laws. The Criminal Procedure Act No. 51 of 1977 also plays an important role in criminal trials as it guides and determines the process to be followed.

Although South Africa celebrated its democracy in 1994, the crime rate has increased. This is an unfortunate situation that affects all segments of society -- crime knows no bounds and no South African is immune to it. It is probable that a number of people will interact, at some point, with the Criminal Justice System, as a victim, witness or having been accused of crime. Nonetheless, the South African criminal justice system, derived from an amalgamation of Roman Dutch and English law, is fairly well-developed and modern.

2.6.1. Child Justice Act, 2008 with regard to children in conflict with the law

Children in conflict with the law are dealt with in terms the Child Justice Act (Act No.

75 of 2008). The Child Justice Act was developed in line with the Constitution and within the ambit of international instruments. Both the Constitution and the international instruments are designed to protect children in conflict with the law. The Act provides direction and guidance towards treatment and protection of children. Therefore, the emphasis is that every decision must be in the best interest of the child (Gallinetti, 2009:7). The Act also ensures that child justice matters are managed in a manner that will assist children in conflict with the law. It is expected that the implementation of the Act will include the restorative justice approach, diversion and other alternative sentencing options. These processes will assist children suspected of committing crime in becoming productive members of society without being stigmatised. The child justice process pertaining to children in conflict with the law will be explored in chapter 3.

It is important to acknowledge the role played by children in the 1980s as they were at the forefront of the struggle for democratic change and a free society against the apartheid regime. As punishment for their political activism, children were detained without trial. This tenuous situation led vigorous efforts in human rights activism by NGOs. This state of affairs eventually led to a series of campaigns to change conditions for children in conflict with the law (Skelton, 1996:41).

During and throughout the political turmoil, the plight of children under the age of 14 was still disheartening as they were still being incarcerated and treated in the same manner as adults. Nevertheless, children did not have separate detention facilities except for reformatory schools and places of safety, which were also overcrowded. Significant changes for juvenile law reform were realised in the early 1990s. Because of the significant changes in the political climate, there was a reduction on the detention without trial for political activists, a moratorium placed on the execution of the death penalty, the release of Nelson Mandela from prison on 11 February 1990 followed by negotiations for the transition to democracy (Sloth-Nielsen, 1999:469).

The criminal justice components and process in South Africa operate in the same manner as other international countries. It consists of three components - the police, courts and corrections - with a common goal of enforcing the law. The functions of each component will be discussed in the following section.

2.7 COMPONENTS AND PROCESS OF THE CRIMINAL JUSTICE SYSTEM

Whilst a number of people and organisations fulfil functions in the criminal justice system, the key role players are the Judiciary, the National Prosecuting Authority (NPA), the South African Police Services (SAPS) and the Department of and Correctional Services. The Judiciary refers to judges and magistrates who preside over criminal and civil trials as independent and neutral parties. Probation officers also play a significant role in the process. The role of a probation officer will be explored in chapter 5.

2.7.1 The South African Police Service (SAPS)

SAPS derives its mandate from section 205 of the Constitution of the Republic of South Africa. Police officers are appointed in terms of chapter 5 (13) of the South African Police Service Act No.68 of 1995. SAPS is responsible for the prevention, detection and investigation of crime. The South African Police Act makes provision for various units such as organised crime and public order policing, and priority crime prevention². The responsibility of these units is to investigate organised crime and any criminal activity that is deemed harmful to the country. The Act also provides for the establishment of community police forums. These forums promote effective communication and enhance partnership between the police and communities in the fight against crime (SAPS 2015/16 Annual Report). For the public, the most common units are either the uniform

² The South African Police Service Act, No. 68 of 1995:Chapter 6 (organized crime and public policing) (priority crime prevention)

branch or detective branch. Uniformed police officers work at police stations and are visible on the streets doing patrol duties. However, the main responsibility of police is crime prevention. Once the crime is reported, an investigation is conducted and evidence is gathered for prosecution purposes.

Members of the police also handle cases that involve children. Therefore, they are expected to be conversant with the Child Justice Act of 2008. When a child, between the ages of 10 and 14 is apprehended, the police must inform the probation officer. The probation officer will assess the child to determine a child's age. If there is uncertainty regarding the child's age, the necessary information will be gathered as per the Child Justice Act No. 75 of 2008. The assessment of children in conflict with the law will be discussed in chapter 5. Once the suspect is arrested and in custody, SAPS has a legal obligation to take the accused to court within 48 hours of the arrest. SAPS works hand-in-hand with the NPA.

2.7.2 The National Prosecuting Authority (NPA)

The NPA was established in terms of the Constitution of the Republic of South Africa Act 108 of 1996). The National Director of Public Prosecution is appointed in terms of section 179(1) (a) of the Constitution. Prosecutors are appointed in terms of section 16(1) of the National Prosecuting Act No. 32 of 1998. Therefore, the NPA operates under the National Prosecuting Act No. 32 of 1998. The Constitution and the National Prosecuting Act provide the prosecuting authority with the power to institute criminal proceedings on behalf of the state and to perform the necessary tasks in support of this function. This includes supporting the investigation of a case or discontinuing criminal proceedings where necessary. Unlike many other countries where there is an obligation to prosecute once a case has been made, the NPA has a discretionary power to decide whether to prosecute or not (<http://www.gov.za/about-government-system>).

The NPA falls within the ambit of the Department of Justice but also has its independence. The National Director of Public Prosecutions is the head of the NPA. Each province has its own Director of Public Prosecutions who is responsible for the management of prosecutions within their jurisdictions. Most local offices will have a senior public prosecutor or a control prosecutor in charge. The prosecutor is the state's attorney and represents the victim or claimant in criminal cases (National Prosecuting Act No. 32 of 1998).

NPA states in its 2015/16 Annual Report that it prides itself in achieving a significant overall conviction rate of 93%. In the High Courts, prosecutors have maintained a conviction rate of 89.9% with 910 guilty verdicts, exceeding the target by 2.9%. Prosecutors in the regional courts attained a conviction rate of 78.4%. Therefore, this represents the highest conviction rate in this forum for the past decade, with 24 958 guilty verdicts. In the district courts, prosecutors achieved a conviction rate of 94.7%, exceeding the target by 6.7% and with 263 377 guilty verdicts (<http://www.npa.gov.za/node/32>). While the NPA's achievement is commendable, the increase in crime against women and children is worrying and reflects negatively towards the country.

2.7.3 Courts

The judicial authority in South Africa is bestowed in the courts. The courts are independent and subject only to the Constitution and the law. Therefore, no person or organ of state may interfere with the functioning of the courts. Hence, an order or decision by a court binds all organs of state and people to whom it applies. The South African Constitution provides the following:

- **Constitutional Court**

The Constitutional Court is the highest court in the country. The decisions made at the Constitutional Court can never be overruled. This court also ensures that the Act of Parliament follows the constitution and the Bill of Rights.

- **Supreme Court of Appeal (SCA)**

The Supreme Court of Appeal is the final court of appeal regarding any matter except for constitutional matters. It deals with all criminal appeal cases from the High Court, including civil matters.

- **High Court**

The High Court only deals with serious cases that the lower courts do not have the competence to make an appropriate judgement or to impose a penalty. These cases include:

- murder;
- rape;
- treason;
- serious commercial and politically motivated crimes; and
- serious and complex fraud cases.

Except where a minimum or maximum sentence is prescribed by law, their penal jurisdiction is unlimited, which include handing down a sentence of life imprisonment in specified cases. It also handles appeals and reviews from the district and regional courts. Civil matters are handled in the high court (<http://www.gov.za/about-government-system/justice-system/administration-justice>).

- **Magistrates' Regional and District Courts**

The Magistrates' Courts form an important part of the judicial system as it is at the Magistrate's Court where ordinary people are exposed to the justice system. Regional Courts are established in accordance with provincial boundaries. The regional courts adjudicate civil disputes. Regional and district courts handle the less complex and less serious matters.

- **Small Claims Court**

The Small Claims Court deals with civil claims that do not exceed R7 000. The decision of the court is final and there is no appeal to a higher court.

South African criminal courts operate on an adversarial system, which means that there will always be two opposing parties litigating, with the magistrate or judge sitting as neutral arbitrator or umpire. The Regional courts are presided over by a magistrates and the High Courts by judges. Most cases are heard at the Regional Courts.

2.7.4. Corrections

The Department of Correctional Services is at the receiving end of the criminal justice system. Once an offender is sentenced, the Department of Correctional Services takes over the responsibility of accommodating the offender until his/her release from custody. The Department of Correctional Services operates under the Correctional Services Act No. 111 of 1998 in order to deliver its objectives. Correctional system contributes to upholding and preserving a just, nonviolent and safe society by undertaking the following:

- Implementing courts' rulings in the manner prescribed by the Act.
- Ensure safety of incarcerated offenders and maintain their human dignity.
- Encourage social responsibility and human development of all offenders and persons subject to community corrections. (Department of Correctional Services Act, 1998 (Act, 111 of 1998)).

In its mission statement, which was developed in 2002, the Department of Correctional Services pledged its commitment to “prioritise rehabilitation as a central process in all departmental activities in partnership with external stakeholders, through:

- The integrated approach which channels all departmental resources to focus on correction offending behaviour and promote social responsibility and development of incarcerated offenders under corrections. According to the 2015/16 Annual Report, the department has established halfway houses for ex-offenders. The purpose of these halfway houses is to provide support that will facilitate the successful reintegration of ex-offenders into society.
- The cost-effective provision of correctional facilities that will promote security, correction, care, and development services within an enabling human rights environment. The Department of Correctional Services accommodates sentenced offenders in its correctional centres countrywide. Youth correctional facilities are designed to accommodate children and youth offenders who are under the age of 21 years old. In terms of section 7 of the Correctional Services Act, children under the age of 18 years are kept separate from older offenders. Female offenders are kept separate from male offenders. Separation also applies to sentenced and awaiting trial detainees. Rehabilitation and educational programmes are provided within the correctional centres.

Mnguni and Mohapi (2015:53) highlight the importance of rehabilitation programmes as well as the crucial role, which social workers play to ensure that these programmes are accessible to the inmates. “Progressive and ethical management and staff practices within which every correctional official performs an effective correcting and encouraging role” (White Paper on Corrections in South Africa, 2005:73).

However, the ongoing problem facing the department is overcrowding. Overcrowding hampers the Department’s hopes at achieving its rehabilitation efforts as stipulated in the Department of Correctional Services No. 111 of 1998. During the 2015/16 financial year, there were 159 331 inmates in correctional centres countrywide. The table below indicates the number of young offenders in youth correctional centres during the 2015/16 financial year:

Table 12: Average number of sentenced offenders per category and age group during 2015/16

Children (<18 years)		Juveniles (18–20 years)		Youth and adults (21 years and older)		Total
Females	Males	Females	Males	Females	Males	
3	184	103	4 023	2 946	109 692	116 951

Source: Department of Correctional Services: 2015/16 Annual Report

Given the fact that crime rate is constantly increasing, it is evident that the Department Of Correctional Services will still experience overpopulation, which will impact negatively on its rehabilitation efforts (http://www.dcs_annual_reports_2015_16).

2.8. CONCLUSION

The purpose of this chapter was to explore the criminal justice system internationally and in South Africa. The key components within the criminal justice were discussed. The most important factor is that the criminal justice system can be fully functional when all the components of the system work together in a cohesive manner in fulfilment of their respected roles. No part of the system can succeed if it operates in isolation. The common goal for these components is to uphold the law and punish those who violate it. Although each country has its own rules and regulations, the fundamental principles remain the same. Sanctions for those who break the law will also differ from country to country. The success of the criminal justice in enforcing law relies on every component.

CHAPTER 3: DEVELOPMENT OF THE JUVENILE JUSTICE INTERNATIONALLY AND IN SOUTH AFRICA

3.1 INTRODUCTION

The juvenile justice system has developed tremendously both internationally and in South Africa. Historically, youth offenders accused of crimes received no special treatment, instead they received the same treatment as adult offenders. Countries worldwide had to undergo numerous developments to ensure the protection of children and their rights. The juvenile justice landscape in South Africa has undergone numerous reforms and influences to date. This is in relation to the manner in which this vulnerable group is being treated and processed by criminal justice system clusters such as the police, courts and correctional services. However, for the purpose of this study, focus will be on the Department of Justice in dealing with children in conflict with the law.

The implementation of the Child Justice Act No. 75 of 2008 provides children in conflict with the second chance in life. The act further enforces that a child who has committed a crime should be guided and treated with respect. The Child Justice Act does not condone criminal acts nor does it create lawlessness, but places its focus on the best interest of the child with an expectation of the child taking up responsibility and accountability. This chapter has a twofold focus, namely International and South African developments in the juvenile justice.

3.2 INTERNATIONAL DEVELOPMENTS REGARDING JUVENILE JUSTICE

Children are society's most vulnerable group and therefore need protection. Advocacy for children's rights and juvenile justice reform has been a worldwide struggle that has eventually resulted in numerous international developments towards the protection of children. Tiwari (2011:1) states that currently, there is a wide range of international and regional instruments that are designed to protect children given their vulnerability. Mpya (2013:2) echoes this statement by asserting that "The United Nations human rights system provides for human rights protection through treaties and declarations, including international instruments aimed specifically at the protection of children's rights. Treaties and declarations which form the basis for the protection of children's rights are collectively known as the "International Bill of Human Rights".

Skelton and Tshehla (2008:15) highlight four international instruments that guide the treatment of children in conflict with the law. These are the United Nations Convention on the Rights of the Child (UNCRC), the United Nations Guidelines for the Prevention of Juvenile Delinquency, United Nations Standard Minimum Rules for the Administration of Juvenile Justice, United Nations Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty, the African Charter on the Rights and Welfare of the child. These international instruments will be discussed in the following sections.

3.2.1 The United Nations Convention on the Rights of the Child (UNCRC)

Tiwari (2011:1) describes the UN Convention on the Rights of the Child (UNCRC) as first treaty that created a paradigm shift towards a "rights-based approach" and held

governments legally accountable for failing to protect the right of children.³ The UNCRC was ratified by the South African government in 1995 and is the basis on which the legislative and policy framework towards the protection of children are shaped. The South African Constitution and the Child Justice Act were developed within the ambit of the UNCRC.

Skelton and Tshehla (2008:16) mention that the UNCRC is an important tool because it deals with a comprehensive variety of children's rights. Furthermore, it provides an extensive framework and guidance on the implementation of these rights. Tiwari (2011:7) states that the UNCRC consists of 54 articles. In March 2003, it was ratified by all countries except the United States. However, the United States eventually signed the treaty. The focus for this section will be on Articles 37 and 40 since they precisely focus on juvenile justice. However, Skelton and Tshehla, (2008:16) caution that "the phenomenon of children committing crimes should not be seen as a pathology that can be separated from other developmental issues regarding children, and therefore the CRC should ideally be read in its entirety."

While Article 40 of the UNCRC deals with the administration of juvenile justice, Article 40(1) urges state-owned and public entities parties to respect the rights of children in conflict with the law and be treated in a manner consistent with the promotion of the child's sense of dignity and worth. The article further reinforces the child taking into account the child's age and encourages a child to be a responsible law abiding citizen (MacDonald, 2014:70). Article 40(2) guarantees every child accused of a criminal offence with protection and treatment, which is based on the child's age and in the "best interest of the child". Article 40 and sections 28(1)(g) and 35 of the Constitution provide protection to child offenders (Skelton & Tshehla, 2008:16).

³ The UN Convention on the Rights of the Child: An Analysis of Treaty Provisions and Implications of U.S Ratification (Article 40) (Todres et al. 2006).

Article 40(3) of the UNCRC urges countries to institute applicable legislations which precisely handle child offenders. Therefore, being a signatory to the ratification of the UNCRC, means that South Africa agreed to abide by the signed treaty which include developing a specialised legal framework and infrastructure to cater for children accused of crimes (Fineman & Worthington, 2009:381).

Article 40(3)(b) emphasises the establishment of appropriate measures for dealing with children in conflict with the law without resorting to judicial proceedings. This article refers to the process of removing children from the conventional justice process into other alternative programmes (Todres et al, 2006:326). Skelton & Tshehla (2008:17) Assert that diversion has emerged as a “central feature” of all advanced juvenile justice systems in the world. Furthermore, the UN Standard Minimum Rules for the Administration of Juvenile Justice reinforce the use of diversion.

Article 40(4) places emphasis on diversionary measures and the importance of developing diversion programmes that will enhance children to become constructive and assertive individuals. However, Skelton & Tshehla (2008:16) highlight the fact that even though the legal framework in South Africa authorities a variety of alternative sentencing options, such as diversion programmes, practically, there is limited access to such programmes in rural areas as they “tend to be clustered in urban areas”.

(Skelton & Tshehla, 2008:16) further explain that Article 37 of the UNCRC contributes immensely towards protecting the rights of child offenders. Hence it states categorically the condemnation of endangering a child through aggressive and harsh punitive measures and extreme imprisonment sentences. Separation of incarcerated children who are younger than 18 years from adult offenders is also highlighted (Skelton & Tshehla, 2008:16)It is notable that Section 28 of the Constitution provides for separation of children, which the Department of Correctional Services Act is also enforcing.

3.2.2 The United Nations Guidelines for the Prevention of Juvenile Delinquency

The United Nations Guidelines for the Prevention of Juvenile Delinquency also known as the Riyadh Guidelines provide direction to countries towards developing approaches to discourage involvement of young people in crime. This instrument asserts a bigger picture for possible actions to be taken in addressing the prevention of juvenile delinquency. It is true that these guidelines do not provide quick or easy solutions; however, actual determinations on developing a range of strategies that address offending behaviour is essential. These prevention strategies are more relevant when a child has not yet committed crime. Furthermore, interventions to empower family and community must be developed for the success of the child justice system (Skelton 1996:184).

Skelton & Tshehla (2008:19) further points out that the focus of the guidelines is based on the “Socialisation Process” which can be viewed as a holistic approach that focuses on the involvement of the family, education, the essential role of the community and community-based prevention programmes. To ensure that the “Socialisation Process” is realised Bezuidenhout (2013:102) points out the following strategies:

- The child and adult partnership approach should be developed in order to enhance their relationship. The parent-child relationship will assist the young person to share the process of their development with their parents.
- Provide effective life skills to young people, which will enable them to develop social, emotional, ethical, physical, and cognitive competence.
- Facilitate and model healthy relationships, which will benefit them positively in life since children imitate what they see and experience in their early developmental stages. It is imperative that children are surrounded by role models who are able to demonstrate and infuse a sense of responsibility and positive behaviour to a child”.

The family plays a pivotal role in the upbringing of a child, hence it also needs support from government and the community to preserve its integrity. It is, therefore, imperative that government should establish policies, which will enable a conducive and stable family environment to raise children. The guidelines reinforce special assistance from government to support organisations which provide services to children and their families especially those affected by changes which are beyond their control such as unstable economy, social and cultural environmental changes (Skelton & Tshehla, 2008:19).

Skelton & Tshehla (2008:18) affirm that the guidelines further emphasise the development of community-based services and programmes that respond to the special needs, problems, interests and concerns of young persons and offer appropriate counselling and guidelines to young persons and their families. Should they already exist, these services must be strengthened. NGOs such as NICRO and Khulisa already exist although continuous support from government and the business sector will always be appreciated by NGOs.

3.2.3 The UN Standard Minimum Rules for the Administration of Juvenile Justice

According to Skelton & Tshehla (2008:20) The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, which are known as the Beijing Rules serve as a model of an ideal justice system for young offenders.⁴ The Rules include the following:

⁴ The United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules).

3.2.3.1 Minimum age of criminal capacity

Skelton & Tshehla (2008:21) explain that although the Beijing Rules approve that a child should be held criminally liable at a reasonable age, such age must not be too low. Furthermore, deliberations on the child's age of criminal capacity must take into account a holistic maturity of the child. Hence, the Child Justice Act has raised the minimum age of criminal capacity to 10 years. (Bezuidenhout, 2013:220) confirms that section 7(1) of the Act clearly specifies that a child whose age is lower than 10 years when committing an offence cannot be prosecuted. While section 7(2) of the Act further states that a child who is 10 years or older, but not yet attained the age of 14 years at the time of the alleged commission of the offence, is assumed to lack criminal capacity, unless it is proven beyond reasonable doubt that the child had criminal capacity when the alleged offence was committed.

3.2.3.2 The proportionality principle

The Beijing Rules advocate for a justice process that is fair and just especially for young offenders. Skelton & Tshehla (2008:20) affirm that these rules endorse the criminal justice system that promotes that the punishment of a young offender must be equivalent to the crime committed. Furthermore, the rules promote the notion that when punishment fits the crime, fundamental human rights of young people will not be encroached.

3.2.3.3 Scope of discretion

Skelton & Tshehla (2008:20) asserts that the Beijing Rules envisions more discretionary scope for officials who deal with young offenders during all the phases from the moment the young offender is accused of breaking the law until the finalisation of the trial

process. It also requires a system which instil a sense of responsibility and accountability to all individuals who are entrusted to deal with the young people. In addition, these official must undergo special training so that they have capabilities and skills to protect and guide the young offender. Parents and guardians must be contacted immediately after a young offender is apprehended. The Correctional Services Act is also aligned to these rules. Section 19(3) of the Act authorises that children who have been arrested, must maintain contact with their families.

3.2.3.4 Diversion

Skelton & Tshehla (2008:20) assert that the Beijing Rules promotes the notion of diversion as an approach to avoid formal court route when dealing with juvenile offenders. It is worth mentioning that section 28(2) of the Constitution and the CJA are both aligned and endorse that the overall wellbeing of a child must precede all decisions and actions regarding the child. The Constitution also endorses Article 3(1) of the CRC, which postulates as follows:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interest of the child shall be a primary consideration” (Todres et al, 2006:121).

A decision to divert or convict the child must always be in the best interest of the child. The implementation of the Child Justice Act requires continuous support by all stake holders to promote its effectiveness. The rules encourage the involvement of the individual and of the community in the diversion process. However, the rule posits that diversion involving community service, or other services, should only be done with the consent of the juvenile or his/her parents or guardians. In addition, efforts must be made to provide for community programmes, such as temporary supervision and guidance,

restitution and compensation Skelton & Tshehla (2008:20). Diversion of children will be dealt with in detail in Chapter 4.

3.2.3.5 Adjudication and sentencing

The Beijing Rules postulates a competent authority must deal with young offenders who are charged formally and have to appear before court. This process requires officials to create a conducive environment which will enhance the young offender's participation in the process.

Skelton and Tshehla (2008:23) argue as follows:

Access to legal representation is a requirement in terms of the rules and free legal aid must be granted in those countries where there is provision for such aid". The Legal Aid Board in South Africa offer these services as far as possible to ensure that a young offender receive fair and just treatment which respects the fundamental human rights. Harsh punitive methods such as incarceration which deprive freedom of movement of young offender are discouraged or used in moderation. While corporal punishment is totally forbidden.

The Beijing Rules encourages continuous research on to ensure that policies are implementable and abreast with the current changing evolving environment. Therefore, South Africa needs to be determined in ensuring that the Child Justice Act is evaluated continuously and an ongoing research and evaluation of the child justice process is done.

3.2.4 UN Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty

Skelton and Tshehla (2008:24) states that the Minimum Standards, known as the “JDLs”, covers a diversity of children who are deprived of their liberty. These children are inclusive of those who are incarcerated whether awaiting trial or sentenced. Deprivation of liberty means any form of detention where a young offender is only allowed to leave on a specified duration or condition. In the South Africa, such places include children awaiting trial in places of safety, youth care centres and youth correctional centres.

The JDLs, like other instruments, stress that young people who have not yet turned 18 years should not be “deprived of their liberty except as a measure of last resort”. In the event that a young offender is removed from society, a holistic approach must be followed in dealing with the young person. There is no “one size fits all” which can address the needs of young people. The Child Justice Act has already aligned its processes to address the unique needs of children in conflict with the law by ensuring that “the best interest of the child” becomes a priority. Skelton and Tshehla (2008:24) further point out that the JDLs emphasise reintegration of young offenders into the society and that a young person should be prepared for this transition while incarcerated. Section 19 of Correctional Services Act provides for the rehabilitation of children and pre-release programmes.

The JDLs are premised on a number of fundamental principles. The first states that the juvenile justice system should uphold the rights and safety of children as well as to promote the physical and mental well-being of juveniles. It further states that imprisonment should be used as a last resort, for the minimum period and limited to exceptional cases. This is important point is stressed by all of the instruments. A major portion of the JDLs governs the management and administration of juvenile facilities,

including the physical environment and services they offer, and disciplinary procedures considered appropriate. Regular and unannounced inspections and an independent complaints procedure ensure compliance with all of the above Skelton and Tshehla (2008:24)

The JDLs conclude with a section on the appointment and training of specialised personnel to deal with young people deprived of their liberty. The JDLs are extremely comprehensive, with detailed reference to a large number of issues, which may be of importance to the daily lives of young people in correctional centres and set out in 87 rules. The number of sentenced children under 18 years in correctional centres has declined since the implementation of the Child Justice Act. Section 28(1) (g)(ii) of the Constitution requires that children should be held in a manner that is age appropriate Skelton and Tshehla (2008:24)

3.2.5 The African Charter on the Rights and Welfare of the Child

The African Charter on the Rights and Welfare of the Child was adopted by the OAU in 1990 but only came into force on 29 November 1999. South Africa ratified it on 7 January 2000. The African Charter increases the protection of children in numerous areas. According to Tshehla and Skelton (2008:25), the Charter omitted an important rule in the UNCRC that “no child shall be deprived of his/her liberty unlawfully or arbitrarily”, as well as the provision that imprisonment should be used only as a measure of last resort and for the shortest possible period. Kaime (2009:8) suggests that there is a need for a comprehensive assessment of the Charter to examine details of each provision of the charter. However; these important provisions are included in the South African Constitution, which states very clearly in section 28(1)(g),” that a child has the right not to be detained except as a measure of last resort (<http://www.iss.co.za>). In addition to the rights that a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be (i) kept separately from detained persons over the age of 18 years and (ii) treated in a manner,

and kept in conditions, that take account of the child's age" (Skelton & Tshehla, 2008:25).

3.3 SELECTED COUNTRIES ON JUVENILE JUSTICE DEVELOPMENTS

3.3.1 United States of America

Whitehead and Lab (2013:26) indicate that, historically, children did not enjoy any special treatment; instead, they were regarded as property of their parents or society from birth to the age of five and held similar status as any other property in society. Once they reach the age of six, it was expected of them to behave in the same manner as adults. Whitehead and Lab (2013:29) highlight that the industrialisation of the 1800s resulted in massive population growth of immigrants from a wide range of European countries in search of a better life in America.

Most children were forced to work long hours to provide for their families and neglected education, while others were abandoned by their families and lived on the streets. This resulted in children resorting to criminal activities as a means of survival (Smalleger, 2001:539). According to Regoli, Hewitt and Maras (2013:368), reformers and humanitarians (known as Child Savers) were concerned about the plight of these children who developed into criminals. They advocated for separate institutions that focused on rehabilitative programmes, education and skills training for such children. This resulted in the establishment of juvenile institutions that will equip the youth with the necessary skills and training that they will use after release. These institutions were referred to as houses of refuge and became popular in New York City. They were later adopted in other cities.

Owing to overcrowding in the houses of refuge, conditions worsened. These were militaristic in nature and were characterised by corporal punishment. The primary

objectives of education and training were replaced by custody and discipline. The failure of these houses of refuge led to the establishment of reformatory schools (Whitehead & Lab, 2013:31-32). Reformatory schools focused on education, training and parental discipline. Unfortunately, like the houses of refuge, they also experienced problems such as overcrowding and as a result, skills training was not a priority anymore.

The failure of these interventions led to the establishment of the juvenile courts. The purpose of juvenile courts was to act in the best interest of the child by adopting a philosophy of *parens patriae*. This meant that the state had the power to act and take decisions on behalf of parents. The philosophy of *parens patriae* led to the establishment of the first juvenile court in 1899, which was the first recognised juvenile court in Cook County, Illinois (Whitehead & Lab, 2013:31-32).

The main positive outcome of the juvenile court was that children and youth were treated differently to adult offenders. The court was more informal and caters for the unique needs of young offenders. The focus was more on correcting behaviour and providing assistance rather than punishment. The court later appointed probation officers. The aim was, firstly, to assist juveniles and their parents. Secondly, to enable the court to make an informed decision on appropriate interventions for the youth (Whitehead & Lab, 2013:31-32). Skelton and Tshehla (2008:7) suggest that while *parens patriae* was designed to handle youth who committed criminal crimes, it further extended its scope by including any child who needed assistance and support including children who ran away from their homes.

3.3.2 England

Cunneen and White (2007:6) aver that under the British common law, before the twentieth century, children who were under the age of 7 years were exempt from criminal prosecution. The reason for the exemption was that children were presumed to lack criminal capacity or *mens rea*. However, children between 7 and 14 years were also presumed incapable of committing an offence (*doli incapax*), because they are not old enough to distinguish between right or wrong, unless it could be proven that the child had criminal intent, understood the consequences of his/her actions, and could distinguish between right from wrong.

Cunneen and White (2007:6) further explain that in the early nineteenth century, the criminal justice system did not put much effort on the unique needs of children. Children were not separate from adults. Among workers in English cotton mills, 80 per cent were children. A separate legal category of “juvenile offender” did not exist. However, by the end of the nineteenth century, England and Wales established separate courts for children following the introduction of the Children Act of 1908.

3.3.3 Australia

Australia had already made efforts to put children’s needs first even before the nineteenth century by separating children from adults in prison (Cunneen & White, 2007:6). Young people used to arrive in Australia as transported convicts. This situation became a driving force towards creating a separate system for juveniles. During the 1870s, amendments to legislation allowed the courts to send young offenders to industrial schools under certain circumstances. In addition, if they were behaving “immorally or leading a corrupt” life, or if it was proven that they were difficult to manage, the courts were further empowered to send neglected children to reformatory schools.

Cunneen and White (2007:7) further state that the new legislation enabled the courts to incarcerate young offenders for prolonged duration for the purpose of education and training. Consequently, young offenders were committed to industrial or reformatory schools for lengthy periods regardless of the nature and seriousness of crime. As a result, the “normal sentencing consideration that a punishment should be proportional to the seriousness of the crime was not seen as part of the law governing juveniles”. In the nineteenth century, Australia also established separate juvenile courts. Of importance during the development of the juvenile justice system, is that powers and conditions to release juveniles was decided by the institution’s administration and not by the court. This organisational discretion was legitimated by a philosophy that presumed the state was acting “in the best interests of the child”. Reformatories and industrial schools were often combined, thus undermining the distinction between “neglected” young people and young offenders (Cunneen and White, 2007:7).

Skelton and Badenhorst (2011:8) point out that currently, the laws that regulate the imposition of criminal responsibility to children are based on a child’s age as well as the child’s knowledge of the wrongfulness of a criminal act. Since 2000, the statutory minimum age of criminal responsibility has been 10 years in all Australian jurisdictions (<http://www.chiljustice.org.za>). “Between the ages of 10 and under 14 years, a rebuttable presumption operates to deem a child incapable of committing a criminal act”. If children between the ages of 10 and under 14 years were to be held criminally responsible for their acts, the prosecution, depending on the jurisdiction, has to prove either that the child knew that his/her act was wrong or that he/she had the capacity to know that his/her act was wrong.

Skelton and Badenhorst (2011:8) further maintain that in order to rebut the presumption of doli incapax, the prosecution must prove, based on the Australian Law Reform Commission, that the accused child knew that the criminal act, which the child is charged with was wrong at the time it was committed.

3.3.4 Uganda

Skelton and Badenhorst (2011:11) report that since 1990, Uganda has been pioneering in child justice law reform. Shortly before ratifying the UNCRC, the Ugandan Child Law Review Committee was appointed. The purpose of the review committee was to draft comprehensive new legislation to regulate Uganda's child welfare system. The committee also had a mandate to look at circumstances pertaining to children who came into conflict with the law. "One of the agreed principles to guide the work of the aforesaid committee was that the UNCRC, the African Charter and other non-binding international instruments would be the guide when legislating for children".

Another development is that the Ugandan Children Act of 1997, raised the minimum age of criminal responsibility from 7 years to 12 years and abolished the presumption of *doli incapax*. However, with regard to children below the minimum age of criminal responsibility, the Ugandan Children Act makes no clear stipulations. In such cases, the Act makes provision for the matter to be heard by local government councils that are mandated to take a restorative justice approach.

Skelton and Badenhorst (2011:11) buttress that if the council fails to resolve the matter or if the matter falls outside their jurisdiction, the social welfare and probation officer must make an application to the Family and Children's Court. The purpose of the application is for a supervision or care order. As Skelton and Badenhorst (2011) assert, "A positive aspect of this approach is the mandate placed upon the probation and social welfare officer to monitor the child's progress, including continuing interaction with the child's parents. In addition, this process is done while bearing in mind the wishes of the child, which entails being placed anywhere other than with the child's parents".

3.4 DEVELOPMENT OF JUVENILE JUSTICE IN SOUTH AFRICA FROM 2008 TO DATE

The democratisation of South Africa in 1994 resulted in legislative changes in respect of children who found themselves in conflict with the law. These changes and developments include the international instruments. The international instruments prescribe the manner in which child offenders must be dealt with. The changes in legislation were necessary since children were previously dealt with in terms of the medical model and were “treated”, punished or labelled for their misbehaviours and transgressions. This implied a paradigm shift from the retributive system with a focus on punishment to a restorative justice approach, which promoted accountability and reconciliation (Singh & Singh, 2014:101).

Skelton and Courtenay, in Bezuidenhout (2013:217), explain numerous NGO efforts and appeals to the government for legal reform of the child justice system. In 1992, 13-year-old Neville Snyman died in police cells following a beating by a cellmate after he and a group of friends were arrested for stealing sweets and cold drinks at a nearby shop. Only after this unfortunate incident, government eventually supported activists who work tirelessly campaigning for a separate justice system for children.

Skelton and Courtney (2013:217) further point out that these vigorous efforts by NGOs resulted in draft proposals for a new justice system in 1993. The proposals, which influenced policy developments, were based on the principles of restorative justice and published in 1994. Among the significant developments was the ratification of the United Nations Convention on the Rights of the Child by the South African government in 1995. The ratification of the UNCRC gave direction for a legislative and policy framework towards the protection of children. Other major developments include the South African Constitution, which came into effect in 1996, and the Child Justice Act No. 75 of 2008.

These developments will be discussed in the following sections.

3.4.1 The Constitution of the Republic of South Africa of 1996 regarding children in conflict with the law

The preamble of the Constitution of the Republic of South Africa acknowledges the injustices of the past, especially for children in conflict with the law including those who died in detention owing to the absence of proper protection. It is for this reason that the authors of the Constitution deemed it fit to dedicate section 28 of the Constitution to children, including those who are in conflict with the law. Section 28 focuses on the basic principles of human rights of children and reinforces principle of “the best interest” of the child (Gallinetti, 2009:10):

- Section 28(1) is a “mini-charter” of children’s rights which deals with various issues such as civil, legal and political rights;
- Section 28(1)(a)(b)(c)(d)(e)(f) deals with generic rights of every child including children in conflict with the law;
- Section 28 (1)(g) sets out clear principles relating to the detention of children and further endorses detention of children as a measure of last resort which must be used for the shortest appropriate period of time. In section 28(1)(i) emphasises the separation of children from adult offenders, while section 28(1)(ii) stresses that children must be treated in a manner suitable to their age, and kept in conditions which take into account of the child’s age;
- Section 28(1)(h) requires that the state, at their expense, must assign a legal practitioner to the child, in civil proceedings affecting the child, if substantial injustice would otherwise result (Singh & Singh, 2014:103).

- Section 28 (2) requires that “the best interest of the child” be paramount in every decision considered in relation to the affected entity, while section (3) defines a child as a person under the age of 18 years.⁵
- Section 35 deals with the rights of all arrested and detained persons including children. The most significant element in section 28 is the fact that it reinforces “the best interest of the child principle”⁶ (<http://www.communitylawcentre.org.za>).

3.4.2 The Child Justice Act, 75 of 2008, as a legal response in South Africa

Our children are the rock on which our future will be built, our greatest asset as a nation. They will be the leaders of our country, the creators of our national wealth who care for and protect our people (Nelson Mandela; 3 June 1995).

The Child Justice Act No. 75 of 2008, which came into operation on 1 April 2010, was developed after numerous consultations, as discussed previously. The purpose of the Child Justice Act is to realise the constitutional rights of children who are in conflict with the law by acting in the best interest of the child at all times. Throughout South African history, there was never any legislation which focused on the protection of children who find themselves in conflict with the law. The Child Justice Act was developed within the prescripts of the South African Constitution and the ambit of the international instruments, which both provide direction and guiding principles towards the treatment and protection of children where every action and decision is always taken in the best interest of the child (Gallinetti, 2009:7).

⁵ The rights of children in section 28 of the constitution

⁶The rights of the child in section 28 of the Constitution.

3.4.2.1 Objectives of the Child Justice Act

Bezuidenhout (2013:219) highlights the objectives of the Act as follows:

- a) Protect the rights of children as provided for in the Constitution.
- b) Promote the spirit of *Ubuntu* in the child justice system through-
 - (i) fostering children's sense of dignity and worth;
 - (ii) reinforcing children's respect for human rights and the fundamental freedoms of others by holding children accountable for their actions and safe-guarding the interests of victims and the community;
 - (iii) supporting reconciliation by means of a restorative justice response; and
 - (iv) involving parents, families, victims and, where appropriate, other members of the community affected by the crime in procedures in terms of this Act, in order to encourage the reintegration of children.
- c) Provide for the special treatment of children in a child justice system designed to break the cycle of crime, which will contribute to safer communities, and encourage these children to become law-abiding and productive adults.
- d) Prevent children from being exposed to the adverse effects of the formal criminal justice system by using, where appropriate, processes, procedures, mechanisms, services or options more suitable to the needs of children and in accordance with the Constitution."

A probation officer plays a central role to realise these objectives by assessing every child who is in conflict with the law. The purpose of assessment is to determine whether the child may be in need of care or have any previous conviction or any prospect of diversion (Skelton & Tshehla, 2008:38). To acquire sufficient information, the probation officer has to conduct extensive consultations. These consultations involve the child, the child's family, the court, and other relevant role players. The purpose of these consultations is to obtain sufficient information to make recommendations to the court. The recommendations are mainly about the circumstances of the child.

The Act further stipulates that assessment, in the case of arrested children who remain in detention, must take place within 48 hours after the arrest. A probation officer is defined as any person who is appointed in terms of Probation Services Act No. 116 of 1991. The role of the probation officer in the implementation of the Child Justice Act will be discussed in detail in chapter 4.

3.4.2.2 Scope and application of the Act

Gallinetti (2009:15) explains that the Act applies to children under the age of 18 years who come into conflict with the law. However, the application of the Act becomes complex considering that there are children under the age of 10 years who cannot be held criminally responsible for their actions. In order to simplify the implementation process, the Act applies to the following three (3) categories of children:

- Children below 10 years at the time of the commission of the offence;
- Children who are 10 years and older but younger than 18 years at the time of arrest or when the summons or written notice to appear before court was served on them; and
- Persons between the ages of 18 and 21 who committed an offence when they were 18 years. In this situation, the Director of Public Prosecutions authorises that such persons be assessed and placed into diversion programmes (Skelton & Courtenay, 2013:220).

3.4.2.3 Criminal Capacity of children in terms of the Act

Gallinetti (2009:10) explains criminal capacity as “the concept of age of criminal responsibility which relates to the age at which a child has the mental ability to distinguish between right and wrong, and can understand or appreciate the consequences involved (cognitive mental function) and can act in accordance with such understanding or appreciation (conative mental function). It is the age at which children

have the capacity to commit crimes, and to accept responsibility for their actions. Therefore, this renders them liable for prosecution”.

The Child Justice Act has elevated the minimum age of criminal capacity to 10 years. Section 7(1) of the Act clearly specifies that a child who is below the age of 10 years at the time of the alleged commission of the offence cannot be prosecuted. Section 7(2) further states that a child who is 10 years or older, but has not yet attained 14 years at the time of the alleged commission of the offence, is presumed not to have criminal capacity unless it is proven beyond reasonable doubt that the child had such criminal capacity at the time of the alleged commission of the offence. However; children who are 14 years and above will continue to have full capacity (Gallinetti, 2009:18).

While section 34 further reinforces the probation officer to assess all child offenders including those who are under 10 years and have no criminal capacity. Upon assessment of a child, the probation officer may take the following steps:

- Refer a child to the children’s court, counselling, therapy or a programme, which is intended to suit the child’s needs.
- Where necessary, arrange for support services for a child or arrange a meeting with a child’s parents or any other relevant persons such as police, prosecutor, magistrate and diversion service providers. Taking these steps will enable role players to make an informed decision, which is in the best interest of the child (Bezuidenhout, 2013:220).

Assessment of a child by the probation officer is emphasised by Skelton and Badenhorst (2011:19) as stipulated in the Act. The most crucial element after assessment is the compilation of the assessment report by the probation officer. Recommendations on various issues, as is stipulated in the Act, include the child’s possibly criminal capacity, if he/she is 10 years or older, but under the age of 14 years. Measures to be taken to prove criminal capacity must be included in the report. “It is very important that the probation officer submit the assessment report to the prosecutor before commencement

of the preliminary inquiry. The Act stipulates that if the child offender has already been arrested, the preliminary inquiry must be conducted within 48 hours after the arrest. The decision whether or not to prosecute the child is the responsibility of the prosecutor. Before making such decision, the prosecutor must consider the following factors when a child is 10 years or older, but under the age of 14 years:

- The educational level, cognitive ability, domestic and environmental circumstances, age and maturity of the child.
- The nature and seriousness of the alleged offence.
- The impact of the alleged offence on any victim.
- The interests of the community.
- A probation officer's assessment report.
- The prospects of establishing criminal capacity if the matter were to be referred to a preliminary inquiry.
- The appropriateness of diversion.
- Any other relevant factor.

If the prosecutor is of the opinion that criminal capacity is not likely to be proved he/she must withdraw the charge and may cause the child to be taken to a probation officer for further action in terms of section 9 of the Act. Where the prosecutor is positive that criminal capacity is likely to be proven, the matter may be diverted before the preliminary inquiry, if the child is alleged to have committed an offence referred to in Schedule 1; or refer the matter to a preliminary inquiry.

The purpose of the preliminary inquiry is to consider the assessment report and the probationer's view with regard to the criminal capacity of the child, in cases where the child is 10 years or older, but under the age of 14 years. Secondly, to establish whether an evaluation of the criminal capacity of the child by a suitably qualified person is necessary.

The Act applies to all criminal offences, which are divided into three schedules, namely,

- Schedule 1 - the least serious offences.
- Schedule 2 - serious offences.
- Schedule 3 - the most serious offences⁷.

Children who are charged with schedule 3 offences can be diverted only in exceptional circumstances. The type of offence that the child committed influences the course of action to be taken towards him/her.

2.5 CONCLUSION

The purpose of this chapter was to explore the development of the juvenile justice system in other countries and in South Africa. It is evident that, within the criminal justice system, young people did not receive appropriate treatment for a very long time. However, the efforts made by the activists who were advocating for children's rights, and the rights of young people who came into conflict with the law were eventually successful. Juvenile courts were established in various countries where decisions were made in "the best interest of the child" principle.

The development of international instruments as a guide towards the treatment of juveniles has been another stepping stone in the juvenile justice system. Developments in South Africa such as the Constitution and the Child Justice Act have created an enabling environment for role players to act "in the best interest of the child" within the criminal justice system. The separation of children from adult offenders, the detention of children as a measure of last resort and for the shortest possible period, has been a milestone in the history of the criminal justice.

⁷ Schedule offences, page 108 of the Child Justice Act, 75 of 2008 (Act 75 of 2008).

CHAPTER 4: DIVERSION AS AN ALTERNATIVE TO INCARCERATION OF CHILDREN IN CONFLICT WITH THE LAW WORLDWIDE AND IN SOUTH AFRICA

4.1 INTRODUCTION

Diversion is a process through which children can be 'diverted' away from the criminal justice system on certain conditions such as attending a specified programme. If a child acknowledges responsibility for the wrongdoing, he/she can be diverted to such a programme, thereby avoiding the stigmatisation and even brutalising effects of the criminal justice system. Diversion gives children a chance to avoid a criminal record, while at the same time, the programmes are aimed at teaching them to be responsible for their actions and to avoid getting into trouble again. If they fail to complete the diversion programme and cannot provide a reasonable explanation for such a failure, the prosecutor will continue with prosecution. It is imperative to acknowledge that this is the first time that diversion has been regulated in South Africa. Berg (2012:19) also states that before the implementation of the Child Justice Act diversion was practised in an unregulated environment. This led to a number of discrepancies. Therefore, the best interest of the child was never a priority.

The probation officer plays an integral part in the diversion process. This chapter will firstly deal with the historical perspective of diversion in South Africa, followed by the diversion process as stipulated in the Child Justice Act, and the role of service providers such as the NICRO as the champion of diversion will be explored. Secondly, a brief perspective of restorative justice will also be discussed. Lastly, an international overview of diversion on selected countries will be discussed.

4.2 DEVELOPMENT OF DIVERSION IN SOUTH AFRICA

Before democracy was introduced in South Africa, legal responses to the criminal behaviour of children were inhumane as many were subjected to harsh corporal punishment, especially in the form of caning by police officers. Thousands of children awaited trial in extremely bad conditions in correctional facilities and police cells. They were often held for lengthy periods without their parents knowing their whereabouts (Juvenile Justice for South Africa, 1994:2). In the mid-1990s, the country's legal system started a process of transformation away from a politically motivated repressive approach to a justice system based on the principles of human rights and dignity.

Prior to this period, the legal system did not have a dedicated strategy to deal with children in conflict with the law. Systems were fragmented and scattered among different ministries and departments, while emphasis was placed on the pathology of criminal behaviour as opposed to developmental strategies that acknowledge the strengths of communities, families and children in curbing problematic behaviour. These stakeholders also had no opportunity to participate in legal decisions that affected them. In addition, statutory intervention received more attention than prevention or early intervention in the problematic behaviour of children (Inter-ministerial Committee on Young People at Risk, 1996: 13).

However, formalised diversion programmes originated from the early 1990s when significant developments such as the formation of the Inter-ministerial Committee on Young People at Risk (IMC) were established. This committee led to the establishment of new diversion options and reviewing the existing ones. It should also be noted that NICRO has been one of the leading diversion service providers for children in conflict with the law ever since. Diversion was practised in South Africa even before the law at the time did not specifically provide for diversion. Experiments with the diversion of young offenders were pioneered by NICRO since 1992, with the co-operation of Public

Prosecutors and probation officers. Although diversion was not mentioned in the statutes, it was recognised and pronounced upon by the courts Skelton and Tshehla (2008:45). When the United Nations on the Rights of the child was ratified in 1995, a project committee of the South African Law Commission was appointed to investigate the current juvenile justice and to make recommendations to the Minister of Justice for the reform of child justice.

4.2.1 South African Law Reform Commission (SALRC) 1997

Following the ratification of the UNCRC in 1995, the South African Law Commission was established in 1996 as per stipulations of the South African Law Commission Act No 19 of 1973). The purpose of the committee, also known as the South African Law Reform Commission (SALRC), was to conduct an investigation into juvenile justice. The committee comprised 13 members and led by Advocate A. Skelton as project leader of the Juvenile Justice Project, was to make recommendations to the Minister of Justice for the reformation of children in conflict with the law. It was responsible for the report and drafting of the Bill (Sloth-Nielsen, 1999:478).

Sloth-Nielsen (1999:478) further describes the appointment of the project committee “culmination of early efforts by NGOs to secure a separate legislation on juvenile justice. It was also linked to the United Nations Convention on the Rights of the Child, which was ratified by South Africa in 1995. The UNCRC requires a ratifying country to draft child-specific legislation in relation to juvenile justice”. The project committee submitted an Issue Paper, which was published for comments in 1997. The Issue Paper proposed that a separate Bill for children should be drafted to cater for consistent and formal procedures to deal with children accused of crimes. The Issue Paper was widely consulted by both government and civil society role players. The Issue Paper was followed by a comprehensive Discussion Paper, which was published by the Commission towards the end of 1998 (<http://communitylawcentre.org.za>).

Sloth-Nielsen (1999:478) further explains that the Discussion Paper was accompanied by a draft Bill, which was referred to in the report as “Bill A”. All relevant government departments and NGOs responsible for providing services in the field of juvenile justice consulted broadly on the document. “The draft Bill captured a new system for children accused of crimes by providing substantive law and procedures to cover all actions concerning the child from the moment an offence is committed, through to sentencing, including record-keeping and special procedures to monitor the administration of the proposed new system.”

Central to the draft Justice Bill, was a formal proposal framework for the diversion of children to avoid the stigma associated with having a criminal record. According to Gallinetti (2009:7), emphasis is placed on the role of probation officers in this process.⁸ Sloth-Nielsen (1999:478) highlight that during these workshops and seminars about the Discussion Paper, proffered suggestions, written responses and constructive criticism resulted in momentous support for the basic objectives of the Bill and proposed structures and procedures. The Bill was introduced to Parliament in 2002 and extensively debated until it was eventually promulgated into law on 7 May 2009 as the Child Justice Act No. 75 of 2008 (<http://communitylawcentre.org.za>).

4.3. OBJECTIVES OF DIVERSION AS STIPULATED IN THE CHILD JUSTICE ACT, 75 OF 2008

The purpose of the Child Justice Act is to ensure that all role players clearly understand diversion and its objectives. Therefore, section 51 of the Act stipulate the basic aim and objectives of diversion as following:

¹ South African Law Commission: Project 106; The Juvenile Justice Report contains the contents of the Child Justice Bill (July 2000)

- Dealing with a child and youthful offenders outside the criminal justice system.
- Encouraging a child to take responsibility and accountability for the damage caused by his/her actions.
- Ensuring that the individual needs of a child are met.
- Promoting reconciliation between the child and the victim or the community harmed.
- Facilitate a child's reintegration into the family or community.
- Create a platform for victims to express their views on the impact of crime, and compensate them for the crime committed.
- Prevent stigmatisation of the child with a criminal record owing to the adverse consequences of being subjected to the criminal justice system.
- Reduce the potential for re-offending, thus promoting the dignity and well-being of the child.
- Enhance the development of the child's sense of self-worth and ability to contribute to society (Gallinetti (2009:43)).

The objects of the Act, which are stipulated in section 2,⁹ specify that diversion protects children from being exposed to the adverse effects of the formal justice system. In essence, diversion means that cases are referred away from formal criminal court procedures. According to Gallinetti (2009:45), there are three ways to achieve diversion. The first one is diversion by the prosecutor when minor offences are committed ¹⁰ secondly, diversion can take place at the preliminary inquiry when the inquiry magistrate issues an order.¹¹ Thirdly, a child can be diverted during the hearing process in the Child Justice Court through an order of the court. Significantly, the Act makes provision for regulatory framework to ensure consistency and legal certainty regarding diversion (<http://www.communitylawcentre.org.za>).

⁹ Child Justice Act, 75 of 2008: Objects of the Act (section 2, page 14).

¹⁰ Section 41: Diversion by prosecutor before preliminary inquiry, in respect of offences referred to in Schedule 1.

¹¹ Section 52: Consideration for diversion at the preliminary inquiry.

4.3.1 Criminal capacity in relation to diversion

The Child Justice Act puts emphasis on the child's certainty about criminal capacity, or lack thereof, when considering the diversion of a case. This involves a child who is 10 years or older but under the age of 14 years. Skelton and Badenhorst (2011:25) outline the main reasons for ascertaining the child's age:

- Firstly, a matter may only be diverted if there is a *prima facie* case, including criminal capacity, against a child. Diverting the matter of a child who cannot be prosecuted because he/she lacks the necessary criminal capacity would be unjust. Importantly, a child must comply with the diversion order, otherwise non-compliance with a "diversion order may result in the prosecution of the child in which case the acknowledgement of responsibility by the child may be recorded as an admission by the child or it may result in a more tedious diversion order against the child".
- Secondly, it is critical that before a case is diverted, there must be certainty about the child's criminal capacity because a diversion order from the level two diversion options can take up to 24 months to settle meaning that a child under the age of 14 years does not have the necessary criminal capacity. It is, therefore, completely unacceptable, unfair and unlawful to expect a child, who does not have the necessary criminal capacity to comply with a diversion order for such a lengthy period.

Thirdly, to avoid diversion being misconstrued as ineffective by the prosecutors and magistrates, there may be a reduction in a child's ability to comply with a diversion order if the child did not have the necessary criminal capacity to begin with. "Such a perception will have a serious impact on the successful implementation and application of the Act since it could result in prosecutors and magistrates becoming wary of diverting matters and opting for the prosecution of these matters" (<http://www.issafrica.org>). Furthermore, this could negatively affect a child who should

not be in a diversion programme by exposing him/her to children who have committed crimes.

4.3.2 Diversion levels and preferences

Gallinetti (2009:44) states that the Child Justice Act sets out two levels for diversion options. Diversion levels are connected to schedules containing a list of offences. The list of offences is based on the seriousness of the offence. Whereas schedule 1 contains minor offences, both schedule 2 and schedule 3 refer to with more serious offences and the most serious offences respectively. The purpose of this section is to qualify the diversion options and the circumstances under which these options are selected. Furthermore, section 53(5) of the Child Justice Act provides for time limits for diversion. The time limits are linked to both the level of diversion option and the age of the child offender. Level 1 applies to schedule 1 offences; the time allocation for this category may not exceed 12 months. This period applies to children under the age of 14. In case of children who are 14 years and older, the time frame is 24 months. Reasons for the extension of time frames must be provided for any deviations.

In terms of section 53(6) of the Child Justice Act diversion options for level 2 apply to both schedule 2 and schedule 3 offences. In the case of children under the age of 14 years, the duration for this level may not exceed 24 months, and 48 months for children aged 14 years and older. Bezuidenhout (2013:179) explains that diversion options for level 1 include informal and formal interventions as well as programmes that comprise of:

- A verbal or written apology
- Formal warning with or without conditions
- An order to place a child under supervision and guidance
- Reporting order

- Compulsory school attendance order
- An order which comp a child to spend time with the family
- peer association order
- Good behaviour order
- An order prohibiting the child from visiting, frequenting or appearing at specified places
- Referral to counselling or therapy, and compulsory attendance of vocational or therapeutic programmes
- Symbolic compensation
- Reimbursement of specified objects
- Community service
- Provision to render some service or assistance by the child to a victim
- Payment of compensation

The level 2 diversion options listed in section 53(4)(5)(6)(7)¹² also include the possibility level 1 options, as well as additional intensive interventions that focuses on the seriousness of the offence that level 2 options cater for.

4.3.3. Choice of diversion options

Section 54 of the Child Justice Act stipulates certain factors that must be taken into account before a child is considered for diversion. Gallinetti (2009:45) list these factors:

- The child's cultural, religious and linguistic background must be considered.
- Diversion option should be aligned to a child's educational level, cognitive ability, and consider family and environmental circumstances.

¹² Child Justice Act No.75 of 2008:Sections 53(4){a-d}; 53(5)(a)(i)(ii)(b)53(6)(a)(i)(ii);53(7)

- Observe the proportionality of the option recommended or chosen for the child's circumstances.
- Diversion option to be cognisant of the nature of the transgression and the interests of society.
- Be cognisant of the child's age and developmental needs. Section 54(2)¹³ of the Child Justice Act provides for the combination of various diversion options, which may be used. In addition, section 54(3)¹⁴ caters for an individual diversion option which may be developed for a particular child. This allows for flexibility and creativity where a particular child's needs are not specifically catered for by the available options.

4.3.4 Diversion at the preliminary inquiry

Section 52(1) specifies that a child may be diverted at the preliminary inquiry or later at trial before the Child Justice Court. This is on condition that, firstly, the child accepts responsibility for the offence; secondly, the child has not been unduly influenced to acknowledge responsibility; thirdly, there is a *prima facie* case against the child; and fourthly, the child has agreed on the diversion terms and conditions, along with his/her parents, guardian or appropriate adult (Gallinetti,2009:45).

Gallinetti (2009:45) reinforces that in addition, the prosecutor must indicate that the child may be diverted if he/she is charged with either a schedule 1 or schedule 2 offence. Furthermore, the Director of Public Prosecutions may stipulate that a child who has committed a schedule 3 offence be diverted. Sections 52(2) and 52(3)¹⁵ emphasise

¹³ Section 54(2) (a) (b) refers to diversions options which may be combined for different levels.

¹⁴ Section 54(3) read together with sections 41(1) and 49(1)67(1) (a) make provision for the inquiry magistrate or presiding officer to develop an individual diversion option for a child where applicable.

¹⁵ In terms of section 52(2), a prosecutor can divert a schedule 1 or 2 offence if the views of the victim or any other person who has a direct interest in the affairs of the victim are considered (unless not reasonably possible to do so) and he/she has consulted with the police official responsible for the investigation of the matter. Section 52(3) provides that the relevant DPP

that the opinions of the victims or any affected person must be taken into consideration when diverting a schedule 1 or 2 offence (Gallinetti, 2009:45).

4.3.5 The Minimum Standards required for diversion

The Child Justice Act emphasises that the development of mechanisms to regulate diversion must be applied in a consistent and just manner. This means that diversion options and programmes must comply with the set minimum standards. To ensure compliance, the Department of Social Development (DSD) and NICRO, with assistance from Human Sciences Research Council (HSRC), developed the minimum standards, which were officially launched in 2007 (Berg, 2012:20)¹⁶. The minimum standards enable role players to exercise fairness and objectivity when exploring diversion options while also enforcing compliance from service providers to render effective services that are needs-based with age-appropriate programmes. According to Bezuidenhout (2013:180), the minimum standards as stipulated in the Child Justice Act, postulates the following:

- Under no circumstances may a child be subjected to any form of exploitation, or harmful or hazardous condition that may be detrimental to the child's physical or mental health.
- Conditions for diversion may not interfere with the child's schooling.
- Diversion must be inclusive of all children whether they lack resources.
- Diversion must be sensitive to the circumstances of the victim and must involve the child's parent or guardian.
- Where possible, diversion must impart useful skills and have a restorative element.
- It must also promote the child's understanding of the impact of the offence, and be measurable in terms of effectiveness.

who has jurisdiction of the matter is the person who may divert a matter involving a Schedule 3 offence.

¹⁶ Berg (2012) an explorative Study on Child Diversion Programme Minimum Standard Compliance in The Western Cape.

4.3.6 Monitoring of compliance to diversion

Service providers are compelled to monitor compliance to diversion orders as stipulated in section 57 of the Act¹⁷. Section 57(3) compels the probation officer to monitor such compliance and further specifies the consequences for failure to comply. Such discrepancies are brought to Director-General of Social Development.

In terms of section 58 of the Child Justice Act, if a child fails to comply with the diversion order, the magistrate or Child Justice Court can issue summons or a warrant of arrest. If the child is brought before the court and the magistrate, or Child Justice Court, must hold an inquiry to establish the reason for the child's failure to comply with diversion order (Gallinetti, 2009:45).

4.4 NICRO AS A DIVERSION SERVICE PROVIDER

NICRO was established in 1910 and is the largest, longest-serving indigenous non-profit organisation in South Africa. Specialising in social crime prevention and offender reintegration, NICRO boasts a rich unparalleled history in human rights, juvenile justice and innovative criminal justice reform. At the foundation of all its endeavours, NICRO firmly believes in reconciliation and healing, and its commitment to strengthen a democratic society based on human rights principles" (NICRO, 2015/16 Annual Report). NICRO functions within the ambit of the Child Justice Act in collaboration with all stakeholders who act in the best interest of children in conflict with the law. There are other accredited diversion service providers such as Bosasa and Khulisa. However, the

¹⁷ Section 57 states that the magistrate makes the diversion an order of the court; therefore, the inquiry magistrate or child justice court must designate a probation officer or another suitable person to monitor the child's compliance with the diversion order. Failure to monitor will result in serious consequences for the probation officer or another appointed individual as stipulated in section 57(3).

purpose of this section is to explore the role play that NICRO played, and continues to play, to better the lives of young people through a variety of programmes.

In the early 1990s, NICRO launched the first diversion initiatives in South Africa in the Western Cape and KwaZulu-Natal and later extended these initiatives to other provinces. It is within this framework that NICRO has been key among stakeholders who advocate for early intervention in the problematic behaviour of children (Bezuidenhout, 2013:176). As emphasised in the NICRO annual report earlier, their approach on diversion is based on restorative justice, which focuses on repairing the damage caused by crime. NICRO's diversion initiatives consist of two programmes, namely: the Youth Empowerment Scheme (YES) and Pre-Trial Community Service (PTCS). NICRO later extended the variety of diversion programmes to include Family Group Conferences (FGC), Victim-Offender Mediation (VOM), The Journey and mentoring (Muntingh, 1997:4). These diversion initiatives will be discussed in the following section.

4.4.1 Diversion initiatives

NICRO's research indicates a high success rate in the diversion programmes which were aimed at preventing re-offending and in re-integrating children into their families and communities. NICRO handles more than 10 000 diversion cases each year in all nine provinces. Wood (2003:11) summarises the five diversion programmes offered to juveniles by NICRO:

4.4.1.1 The Youth Empowerment Scheme (YES)

The Youth Empowerment Scheme (YES) is a life-skills training programme that involves young people and their parents or guardians. The programme is offered for six weeks. Arendse (2007) conducted an evaluative study on the experience of diversion workers

and volunteers in the implementation of YES as a diversion programme in the Western Cape.¹⁸

4.4.1.2 Pre-Trial Community Service (PTCS)

The Pre-Trial Community Service allows the offender to perform community service at a non-profit organisation in lieu of prosecution. Community service is aimed at instilling, in the offender, a sense of responsibility and accountability. There must be consultation between a NICRO worker and the public prosecutor on the number of hours that a child must adhere to, and monitor the child's progress.

4.4.1.3 Victim-Offender Mediation (VOM)

The purpose of the Victim Offender Mediation is to bring victims and offenders together in an attempt to reach an agreement that addresses the needs of both parties resulting in a mutually acceptable agreement. A trained mediator must conduct this process. However, Spuy et al (2007:9) caution that tension must be expected in these meetings.

4.4.1.4 Family Group Conferencing (FGC)

The purpose of Family Group Conferencing (FGC) is to create an opportunity for child offenders and those affected by the criminal act to discuss the actions and effects of the crime. This approach applies to first-time offenders and non-violent offenders who commit minor offences. The FGC is aimed at developing a strategy that will enable all parties to remedy the situation to the benefit of those affected. The outcomes of FGC depend on the severity of the crime, ranging from an apology to community service restitution, compensation or the attendance of rehabilitation programmes. The FGC

¹⁸(Arendse,2007) An evaluative study on the experience of diversion workers and volunteers in the implementation of the Youth Empowerment Scheme (YES) as a diversion programme in the Western Cape.

embraces the philosophy of *Ubuntu*, where every child is a child of the nation. This means that a child's problematic behaviour ought to be handled within the family and in a "homely" approach before the conflict can be considered irresolvable.

According to Bezuidenhout (2013:183), family group conferencing is based on the following assumptions:

- Crime does not only affect the victim, but also the family and the community.
- Crime is effectively managed with the active involvement of all stakeholders.
- Responsibility and accountability are achieved by making amends for the wrongdoing, either symbolically or directly to the victim and/or the community.
- The damaged relationship because of crime can only be harmonised through dialogue and negotiation.

Wormer and Walker (2013:105) suggest that these conferences become more fruitful when families, victims and young people are adequately informed of the process and their views are taken into account when arranging the conference.

4.4.1.5 The Journey

The Journey, aimed at high-risk children, lasts 3-12 months and involves life skills training among other things. The Journey is an intensive, long-term programme focused on young people who are most at risk and are determined to change their ways into a constructive and independent life. In addition to the five diversion programmes which have already been discussed, there are other types of diversion programmes which are summarised Bezuidenhout (2013:183):

4.4.1.6 Life skills training

Life skills can be described as those acquired attributes that can enhance one's quality of life and prevent problematic behaviour. Therefore, life skills training equips young people with the capacity to function efficiently within a society and with the ability to effectively react to life's stressors harmoniously. Life skills training enables an individual to successfully deal with provocative situations and conflict, while communicating meaningfully with others.

The South African reality is that the majority of children are subjected to an inferior education system. While traditional value systems are being challenged, this situation is worsened for those children who come from troubled homes and are not exposed or equipped with the necessary life skills needed to cope with day-to-day challenges. Regrettably, it is commonly accepted that children require teaching in cognitive affective and behaviour skills as primary competencies for adulthood. Among others, life skills are required for successful independent living, the maintenance of friendships, success at school, and the prevention of prolonged interpersonal problems.

Life skills training as an intervention makes the following assumptions about the criminal behaviour of children: crime results from an inadequate ability to react appropriately to particular situations and, therefore, requires specific skills to maintain direction and focus in life; the acquisition of relevant life skills strengthens responsibility and accountability; and collective interaction creates opportunities to learn from others. Based on these assumptions, life skill training as a diversionary mechanism makes use of social cognitive theory to bring about change in child offenders.

4.4.1.7 Mentoring

Bezuidenhout (2013:185) indicates that parents are generally viewed as the most important adults in the lives of children since they significantly impact on the beliefs, attributes, behaviours and goals of their children. However, this is not always possible owing to circumstances which may hinder the ability of parents to meaningfully support and develop their children. These include, among others, unstable home environments that are situated in poor and marginalised communities; those characterised by dysfunction, child neglect and deprivation; single, disrupted or inconsistent parenting; and alcohol and drug abuse. In the midst of these challenging circumstances, children may have missed an opportunity to have at least one older, more experienced individual who may provide guidance and stability in their lives. Mentoring means a cross age, dyadic relationship between an experienced, caring adult and a disadvantaged or troubled younger person.

Steyn (2005:283) suggests that the ideal age difference between the mentor and mentee varies between 8 and 15 years. Furthermore, mentoring relationships are based on acceptance and support in order for the mentor to provide attention, guidance and understanding. In the context of child offending, mentoring as an intervention assumes that:

- During their formative years, young people require guidance and support from older, more experienced persons.
- Adolescents who are at risk of criminal behaviour often grow up without a father figure or positive role model in their lives.
- The establishment of long-term, trusting relationships can help at-risk adolescents to cope with challenges.
- Meaningful interactions between a mentor and an at-risk child stimulates a positive self-concept, which in turn promotes responsibility (Steyn, 2005:283).

It is crucial to address problematic behaviour, including minor crimes, at an early stage to prevent more serious patterns of criminal behaviour. This can be achieved by equipping children with the necessary skills to function responsibly and to be cognisant of the impact of their actions. Therefore, absent or inadequate parenting is perceived to play a particular role in the problematic behaviour of children since they need role models in their lives.

4.5 RESTORATIVE JUSTICE PERSPECTIVE

Wormer and Walker (2013:34) posit that “restorative justice began in the 1970s, whilst others believe that restorative justice has been the dominant model of criminal justice throughout most of human history for perhaps the entire world’s people”. They describe restorative justice as a response to crime by taking into account the needs of victims, offenders and the community. The general purpose of restorative justice is to create a process for reconciliation between perpetrators, victims, community members, and friends and family, who are affected by crimes. Usually, the restorative justice process takes place once the accused person admits guilt and accept responsibility for their criminal action. It is crucial that the victim agrees to participate in a restorative process.

This is a reconciliation process, which may include mediation, conciliation, conferencing and sentencing circles, aimed at bringing both parties together in order to actively participate in resolving the matter. Restorative process can take place at the pre-trial, pre-sentence and sentencing stage as well as the post-sentence stage (Skelton & Bentley, 2008:39). The principles of restorative justice are aimed at instilling, in child offenders, a sense of understanding regarding the consequences of their crimes and accepting responsibility of their actions.

Muntingh (1997:11) suggests that the five diversionary options are entrenched in the restorative justice principle, which is opposite to retributive justice in that:

Crime violates people and relationships; justice aims to identify needs and obligations; justice encourages dialogue and mutual agreement; victims and offenders are given central roles; justice is measured by the extent to which responsibilities are assumed, needs met and relationships healed.

NICRO is determined to create more options to address the specific needs of offenders, victims, the criminal justice system and society. Muntingh (1997:11) reinforces the fact that NICRO and the government rely on other stakeholders and experts in the field to make suggestions on establishing additional diversionary options that are especially needed for categories of offenders such as sexual offenders, aggressive offenders, offenders younger than 14 years of age, street children and drug related offenders.

4.6 STATISTICS AND TRENDS OF DIVERSION REFERRAL

During the 2015/16 financial year, NICRO offered individual services to over 9 000 and over 41 000 through services to families. Over 2 300 children and 5 700 adults who committed crimes and were in conflict with the law were successfully diverted and avoided being incarcerated and obtaining a criminal record. Participation in a NICRO diversion programme reduces risk factors associated with criminal and delinquent behaviour, promotes favourable attitudes and develops critical skills that equip offenders to avoid further involvement in crime. During this time, NICRO also rendered offender re-integration services to 1 150 offenders, of which 400 adults were given non-custodial sentences and 750 released from corrections. Crime prevention services that focused on behavioural change were provided in 17 schools nationwide and reached 2 800 learners. Children comprised 24% of those diverted from the criminal justice system while adults constituted 59% (NICRO, 2015/16 Annual Report).¹⁹

¹⁹ NICRO 2015/16 Annual Report for participation of stakeholders, and services and programmes rendered countrywide.

According to Steyn (2010:4), the number of adult and juvenile cases diverted by the South African courts shows a 15% increase, from 37 995 cases in 2005/06 to 50 361 in 2009/10. During the 2009/10 period, 16 166 children were diverted. Of the 427 344 cases in finalised district courts in 2009/2010, 3.7% represented child diversions. This figure was lower in regional courts, where 0.6% of the 40 962 finalised cases involved the diversion of minors (National Prosecuting Authority, 2010: 14).

NICRO, as South Africa's largest provider of diversion services, provides an indication of the referral profiles concerning diversion. Its latest annual report (2006/07) shows that diversion was delivered to 17 786 children in conflict with the law. The caseload by diversion option was 55.3% life skills training, 24.1% pre-trial community service, 9.8% outdoor intervention, 7.9% victim-offender mediation, and 2.5 family group conferencing. Two-thirds (66.9%) of diverted children were Black, followed by 23.4% Coloured, 6.5% White and 3.2% Asian. The majority of diverted children were male (77.5%). The offence profiles amounted to 67.1% property crime, 22.7% crime against a person, and 10.2% victimless crime.²⁰

For several years, NICRO has dedicated its services to diverting young offenders away from the criminal justice system and eventually changing offending behaviour, thus providing them with an opportunity of becoming responsible law-abiding citizens as well as an opportunity to reach their full potential.

4.6.1 National Beneficiary Profiles

According to the 2015/16 Annual Report, NICRO's beneficiaries are society's most vulnerable, marginalised, disempowered individuals who are in conflict with the law.

²⁰ Approaches to diversion of child offenders in South Africa: A comparative analysis of programme theories (Steyn, 2010, p4).

These individuals are primarily young people and first-time offenders, incarcerated persons, released prisoners and their families, victims of crime and violence who are mainly abused women and survivors of domestic violence; and all communities made vulnerable by crime. Approximately 77% of the beneficiaries of NICRO's direct services are male while 23% are female; from these, 69% are Blacks while Coloureds, Indians and Whites constitute 17%, 7% and 7% respectively. While 18% of the organisation's beneficiaries are under the legal age of 18 years, 59% are aged 18-35 years and are classified as youth, while 23% are aged 36 years and older. In total, 37% of all beneficiaries are unemployed and 25% have formal employment. On average, NICRO renders direct and indirect services, including community outreach, capacity building and awareness initiatives to some 40 000 beneficiaries annually with financial aid and human resources available to the organisation.²¹

4.7 INTERNATIONAL OVERVIEW OF DIVERSION IN SELECTED COUNTRIES

In a cross-national comparative study of youth justice, Hazel (2008:47) reports that international countries in the 1960s embarked on a drive to find ways of diverting young people from the full effect of court proceedings. The aim of this initiative was to find alternative interventions that will prevent young people from being exposed to the adverse effects of the formal court proceedings thus preventing young people from being associated with the stigma of a criminal record. What emerged was a spectrum of diversionary tactics - each somewhere towards this ideal - across a large number of countries. Along this continuum towards true diversion, young people may be diverted to other parts of the juvenile justice system. The following diversionary strategies emerged across a number of countries:

²¹ NICRO: 2015/16 Annual Report.

- Informal cautioning, mediation, general diversion from formal processes of social control.
- Unconditional dismissals, police cautions, conditional dismissals (fine, restitution), handling of cases outside of the criminal justice system.
- Mediation, deferred sentences.
- Community service, no short sentences, early release which is in line with government policy adopted in England and Wales in the early 1980s.²²

Diversion has also been found to be a key element for a more effective approach designed to promote the integration for young adults.

4.7.1 Australia

According to Winterdyk (2015:60), the majority of jurisdictions across Australia have experienced changes focused mainly on diversion that reinforced the principles of restorative justice since the 1990s. Through extensive studies and research, Australia has examined youth offending and recommended the implementation of diversionary programmes such as formal and informal cautioning, and family conferencing to prevent young people from entering the formal courtroom within the criminal justice process.

Winterdyk (2015:60) maintains that children under the age of 10 years cannot be charged with a criminal offence. In practice, young people between 10 and 14 years in all Australian jurisdictions are deemed to be incapable of committing crime (“rebuttable presumption”). Similar to the South African child justice system, the Australian youth justice system believes that incarceration of young people, especially children, must be the last option and for the shortest appropriate time in line with the UNCRC.

The diversion of young offenders in Australia is similar to South Africa in that the

²² (Hazel, 2008:48) cross-national comparison of youth justice in the diversion processes and comparative analysis and patterns in youth justice approaches, policy and provision across jurisdictions.

decision to divert lies with the prosecution team and the court. A proper assessment of the child and the circumstances surrounding the case must be conducted, including a thorough investigation of the alleged offence as a precondition to a diversion order. Bruckmuller and Schumann (2015:33) further point out two types of diversionary measures for juveniles: non-interventional or interventional:

4.7.2 Non-interventional Diversion

Non-intervention is recommended for young offenders who have committed minor crimes such as stealing or shoplifting items of low value and in cases where the maximum penalty for the offence committed is a fine or imprisonment of up to a maximum of 5 years. Where the maximum penalty for offences such as robbery and extortion is a fine or imprisonment of up to 5 years, non-intervention diversion may be recommended provided that the crime did not lead to anyone's death. However, the prosecutor and judge may drop the case to prevent a juvenile from re-offending where they deem interventional measures as unnecessary. It is crucial that discretionary decisions take into account aspects of deterrence and public confidence in laws.

4.7.3 Interventional Diversion

Where charges cannot be dropped and where other forms of punishment do not seem necessary to prevent a young offender from re-offending, interventional diversion becomes obligatory. However, the juvenile's level of guilt must not be severe and the culpable act must not have resulted in the death of a person other than a family member. Where the penalty range exceeds a maximum of 5 years imprisonment, robust mitigation circumstances are needed to opt for measures of diversion. Furthermore, the juvenile suspect has to give his/her consent for the diversion proceeding.

In addition to the above-mentioned disposition options, other interventional measures available to the prosecutor or court include a probation order that can be linked to other special obligations such as victim-offender mediation that requires the victim's consent, community services and fines without conviction. A fine may only be ordered on condition that the juvenile can afford to pay the money without causing unwarranted suffering. A positive factor in this instance is that when a juvenile is given diversion disposition, it will not be included in the Police Clearance Certificate. This means that public prosecutors may prevent a conviction's potential stigmatising effect by applying measures of diversion instead of indicting the young offender.

4.7.4 England and Wales

Winterdyk (2015:356) underscores that the Youth Justice System (YJS) in England and Wales emphasises the prevention of offending and re-offending by children under the age of 18 years. "At the heart of modern youth justice is the notion that children's offending should be treated differently to adult offending because of their immaturity and undeveloped capacity to constrain their impulses". Furthermore, the Youth Justice and Criminal Evidence Act of 1999 introduced a referral order, which requires the court to adopt a restorative approach when dealing with children aged between 10 and 17 years, who plead guilty as first-time offenders and for whom it was unintended by the court to impose a custodial sentence, hospital or absolute discharge (Winterdyk,2015:356).

Fundamentally, the referral order means that a young offender is referred to the "youth panel" within the local youth offending teams (YOT). The panel then endeavours to reach an agreement with the offender to attend a programme of activity based on the restorative justice approach, which is intended to prevent re-offending. The Legal Aid, Sentencing and Punishment of Offenders Act of 2012 brought about significant changes to the YJS (Gelsthorpe & Kemp, 2015:356). The Act has reduced and simplified the out-of-court landscape by introducing three new out-of-court disposals for juveniles; namely,

community resolutions, youth cautions and youth conditional cautions. These disposals can be used in any order. Gelsthorpe and Kemp (2015:356) further explain that where the offender has been identified, the aim of a community resolution is to provide an informal response to low-level offending or for antisocial behaviour. It is primarily aimed at remorseful first-time offenders. If both the offender and victim reach an agreement, the parties can resolve the offence through an informal agreement instead of the police taking formal action. A community resolution can be diverted with or without the use of restorative justice techniques.

The police should interview the accused young person prior to taking any formal action, or imposing a youth caution or youth conditional caution. Such interview should take place in the presence of at least a parent or guardian. If the young person denies the offence, the police must either drop the case or defend the case in court. In the event that there is an admittance of guilt and the police have sufficient evidence to charge the young person, they have the prerogative to halt further action or pursue informal recourse such as community resolution for minor offences or impose a youth caution or youth conditional caution. These disposals must be issued by a police officer in the presence of an appropriate adult and must be formally recorded. However, if the young person commits another crime, these actions may be quoted in court. Youth cautions and youth conditional cautions are used as alternatives to prosecution for young offenders (Winterdyk, 2015:358).

4.7.5 Namibia

Schulz (2015:223) states that in terms of the Criminal Procedure Act No. 51 of 1977 power to divert is entrusted to the prosecutor-general. The Act further states that the prosecutor-general may “withdraw” charges against a child on condition that the child accepts certain measures such as community service and mediation. However, in Namibia, the prosecutor-general has authorised diversion for only minor offences

even though the legislation does not stipulate any limitations for diversion. The concern is that where diversion would serve the best interest of the child, it is practically unavailable. Schulz (2015:223) further clarifies that “The Namibian police do not have any authority to divert or discharge a child on own cognisance after an arrest. Therefore, the law prescribes that after arrest, the child must first appear before a magistrate. The prosecutor will then decide whether or not to continue with the prosecution, based on the recommendation of a social worker.”

Schulz (2015:223) asserts that this practice, which is presently authorised by the predominant legislation on criminal procedure, suggests that even children who do not have any previous record or who have committed relatively minor offences are diverted into programmes, although ideally they would otherwise not have entered the criminal justice system. Apart from section 6(1) of the Criminal Procedure Act, the legal ramifications for diversion are unspecified. Since the prosecutors’ powers to make diversion decisions are not regulated and structured, the process may lead to discrimination (Schulz, 2015:223). When a child does not comply with the condition does not necessarily lead to a final closure of the case. In addition, the prospect to pursue legal advice or other support is virtually non-existent (Winterdyk, 2015:223).

Pre-trial Community Service (PTCS) and Life Skills Programme (LSP) are the only available diversion options which poses a challenge as well. Secondly, there is no standardised diversion process, therefore, each region implement diversion differently (Schultz, 2015:223).

4.8. CONCLUSION

Historically, children in conflict with the law have never been accorded the treatment they deserved. Alternative methods to incarceration such as reformatory schools were just an extension of the correctional centre environment. The aim of this chapter was to highlight national and international developments in juvenile justice, which brought

about numerous methods aimed at diverting children from the criminal justice system. Diversion as an alternative to incarceration is designed to save children from the stigma associated with having a criminal record as well as correcting a child's offending behaviour. The South African view on the diversion of children has been clearly emphasised in the Child Justice Act No. 75 of 2008. NICRO and other accredited diversion service providers played a commendable role by introducing numerous diversion initiatives that cater for the needs of young offenders. Most countries worldwide have embraced the diversion of children in line with the United Nations Convention on the Rights of the Child, which promotes "the best interest of the child principle". However, more work still needs to be done to improve these diversion initiatives.

CHAPTER 5: ROLE OF PROBATION OFFICER IN THE DIVERSION OF CHILDREN IN CONFLICT WITH THE LAW

5.1 INTRODUCTION

This chapter will focus on the role, both locally and internationally, of probation officers regarding children who are in conflict with the law. The study will explore the crucial role played by probation officers in the criminal justice. This will be achieved by highlighting the range of duties and responsibilities which differ per country. The common role in every country is the assessment of offenders accused of criminality. The Child Justice Act no. 75 of 2008 addresses these duties and responsibilities. Probation officers in Australia, England and Wales, and the United States of America will be examined. Among the role players in the criminal justice system, the probation officer is the only one who acts as an intermediary and makes recommendations to the magistrate or judge on the fate of the child.

5.2 INTERNATIONAL PERSPECTIVES ON PROBATION OFFICERS

According to Whitehead and Lab (2006:212), a probation officer plays a crucial role when a child is accused of committing a crime. When a child is arrested, the police notifies a probation officer in order to assess the child. The assessment takes place at the Intake Unit. After the assessment, the probation officer decides whether to file formal charges against the child or to divert the child. Any decision that the probation officer makes is always in the best interest of the child. However, such decisions should take into account the seriousness of the crime and the victims of crime.

5.2.1 Australia

Probation officers in Australia play a very important role in the juvenile justice system, where they are expected to perform a variety of tasks. While their role is to assess juveniles on arrest, they are also responsible for recommending community-based supervision to magistrates or judges for offenders who are serving community-based sentences. Their responsibilities also entail making recommendations to parole boards to determine whether an offender may be granted parole. Probation officers are not only expected to supervise an offender who performs community service, their task is also to develop the community service plans. (https://en.wikipedia.org/probation_officer).

5.2.2 England and Wales

Probation officers are responsible for providing a variety of reports on offenders. Such reports include pre-sentence reports, reports with recommendations on interventions with the likelihood of reducing re-offending, assessment reports of the offender, the nature of the crimes committed and their effect on victims. Probation officers are also in charge of providing the courts with regular reports on the progress of offenders who are issued with orders for drug testing requirements. Furthermore, probation officers supervise a Restorative Justice plan where the victims of crime are afforded an opportunity to address offenders about the impact of the crime. (https://en.wikipedia.org/probation_officer).

The probation officers' job description includes writing and presenting pre-sentence and pre-release reports for the court; offering counsel to offenders and their families, through individual sessions and group meetings; organising and overseeing community service work; and supervising junior staff helping with the rehabilitation of ex-offenders into the community is also part of the job requirements. They conduct visits to court and

Correctional facilities to consult with offenders (http://www.probation_officers.html).

In order to qualify as a probation officer, one has to start their career as a probation services officer. Upon employment, an incumbent would be required to obtain a vocational qualification which is level 3 diploma, followed by a level 5, both in probation practice. Upon completion of such a diploma, the candidate is thus eligible to complete the PQiP. The National Probation Service encourages on-the-job training with a view to either gaining experience or promotion to managerial position. Given the amount of travelling associated with the role, a driver's licence may be necessary. (https://en.wikipedia.org/probation_officer)

5.2.3 United States of America

In the United States, probation officers can be found in a city, county, state and at federal levels where there is court with competent jurisdiction. Probation officers are generally responsible for investigating an offender's personal and criminal history for submission to the court. They are expected to perform any other function as assigned by the court. Probation officers are also required to possess excellent oral and written communication skills together with an extensive knowledge of the criminal justice system. This includes knowledge of the roles, relationships and responsibilities of other role players such as the courts, the parole authority, the Bureau of Prisons or Department of Corrections, local jails, the prosecuting attorneys, and other police agencies. Outside organisations may include legal services, substance abuse counselling and social services agencies. Officers must understand applicable case law and sentencing guidelines.

Additionally, they must possess an ability to work with an extremely diverse population of individuals convicted of various crimes and also work with a wide variety of government agencies and community organisations. Finally, they must accept the potential hazards of working closely with a criminal population. Most jurisdictions require

officers to have a four-year bachelor's degree and prefer a graduate degree for full consideration for probation officer positions at a federal level. Probation officers are usually issued a badge or some other form of credentials and, in some cases, may carry concealed weapons or pepper spray for self-protection. Stereotypically, probation officers do not wear uniforms, but dress in business or casual attire (https://en.wikipedia.org/probation_officer).

5.3. ROLES AND RESPONSIBILITIES OF A PROBATION OFFICER IN SOUTH AFRICA

Probation officers are appointed by the Minister of Social Development, in terms of the Probation Services Amendment Act No. 35 of 2002. The Amendment Act was signed into law by the president in 2002. The Act amends the Probation Services Act No. 116 of 1991. Probation officers are social workers who specialise in crime prevention, the treatment of offenders, and the care and treatment of victims of crime. The Probation Services Amendment Act, therefore, provides a legislative framework for a range of activities already provided for by the Probation Services Act No. 116 of 1991. Significant amendments include:

- Introducing assessment, support, referral and mediation services in respect of victims of crime. The victims of crime are the most affected by crime; hence, they need as much support necessary to enable them to deal with the effects of crime.
- Providing for the establishment of restorative justice programmes and services as part of appropriate sentencing and diversion options. Restorative justice programmes are critical in facilitating the healing process for affected parties.
- Providing for the reception, assessment and referral of an accused person and the rendering of early intervention services and programmes.

- Investigating the circumstances of an accused person and the provision of a pre-trial report on the desirability, or otherwise, of prosecution and the investigation of the circumstances of convicted persons.
- Providing for the mandatory assessment of every arrested child who remains in custody before his/her first appearance in court.
- Providing for the competency of a probation officer to recommend an appropriate sentence or other options to the court.
- Providing for the establishment of a probation advisory committee to advise the minister on matters relating to probation services²³ (Skelton & Tshehla, 2008:39).

Furthermore, the Probation Services Amendment Act makes provision for the establishment and implementation of programmes. The aim of these programmes is to assist in combating crime and rendering assistance to both victims and offenders. Probation officers also work closely with families and communities.

The Probation Services Amendment Act is not the only legislation which prescribes the role of a probation officer for children in conflict with the law. The Child Justice Act also reinforces the role of a probation officer with emphasis on assessment. The main role of a probation officer in terms of the Child Justice Act is to assess every child accused of crime. The following section will explore assessment processes for children in conflict with the law as stipulated by the Child Justice Act No. 75 of 2008.

5.3.1. Assessment of a child in terms of the Child Justice Act, 75 of 2008

The Child Justice Act No. 75 of 2008 prescribes the process of assessment of every child who is in conflict with the law. While the United Nations human rights system provides for human rights protection, the conviction for human rights protection emanates through treaties, declarations and international instruments aimed

²³ Section 3 and 4 of the Probation Services Amendment Act (35 of 2002).

specifically at the protection of children's rights (Mpya,2013:2) (see chapter 3 par. 3.2). The UNCRC obliges state parties to guarantee the protection of children. This is to ensure that the best interest of the child is of paramount importance for every country.

The Constitution of the Republic of South Africa echoes the UNCRC. Section 28 of the Bill of Rights postulates that the best interest of the child is of paramount importance in every matter concerning the child. Therefore, the assessment of children who come into conflict with the law is one of the cornerstones of the Bill of Rights as outlined in the Constitution of the Republic of South Africa. Probation officers are specifically selected as suitable incumbents to ensure that children's rights are appreciated through assessment. The skills and attributes they possess enable them to play this significant role successfully.

In order to support the effective implementation of the Child Justice Act, regulations relating to child justice were developed. The purpose of the regulations is to provide guidelines for the implementation of the Child Justice Act. Hence, Section 1(a) of the regulations issues a directive for the Director-General of Social Development to designate a probation officer for every police station within three months of the commencement of the Act. The designated probation officers will then be notified of a child who needs to be assessed upon arrest by the relevant police official. The police official will also notify the probation officer to determine the child's age when summons are issued and when the child is to appear at the preliminary inquiry. On receipt of such notices, the probation officer is required to assess the child. Furthermore, Section 34 of the Child Justice Act makes provision for every child who is alleged to have committed an offence to be assessed by a probation officer. The purpose of assessment will be explored in the following section.

5.3.2. The purpose of the assessment

The vulnerability of children in society cannot be emphasised enough. However, society fails in many ways to protect children. As a result, some children are forced by adults to commit crimes, while others break the law while trying to protect themselves. Notwithstanding, when a child is accused of crime the law has to take its course. At this stage, any person who deals with a child has to take cognisance of Section 28 of the Bill of Rights²⁴. The whole section emphasises the rights and protection of children who are in conflict with the law. The assessment of children ensures that the best interest of the child takes preference in every decision made.

Section 35 of the Child Justice Act provides guidelines for a probation officer on fundamental areas to address during assessment. Gallinetti (2009:34) summarises these guidelines as follows:

- Estimate the probable age of a child in cases where there is uncertainty - there are instances where a child who is arrested does not know his/her age.
- A probation officer is required to ascertain the child's age or refer the child to a medical doctor.
- Collect information about any previous conviction, previous diversion or pending charge in respect of the child.
- Formulate recommendations regarding the release or detention and placement of the child.
- Determine whether a child is in need of care and protection and whether the child should be transferred to the children's court;

²⁴ The rights of a child as stipulated in the Constitution of the Republic of South Africa No.108 of 1996:Section 28(1)(a)(b)(c)(d)(e)(f)(g)((h).

- Determine measures to be taken when dealing with a child below 10 years of age;
- Establish the prospects of diversion.
- Indicate whether expert evidence would be required in relation to the criminal capacity of a child who is 10 years and older, but below 14 years.
- Consider if the child was used by adults to commit crime.
- Provide any other information regarding the child, which the probation officer may regard to be in the best interest of the child.

Gallinetti (2009:34) further states that assessment of children who are incarcerated after being apprehended, must take place before they appear at the preliminary inquiry. In Section 43(3)(b)(i) of the Child Justice Act, it is stipulated that a preliminary inquiry must be held within 48 hours after the child's arrest. Therefore, it is crucial for the assessment to take place within the stipulated period. Every child who is below the age of 10 years old, must be assessed within 7 days after police have notified the probation officer²⁵. While it is mandatory for certain individuals to attend the assessment, others are not compelled to attend. This distinction will be explored in the following section.

5.3.3 Individuals who must be present at assessment

The Act makes provision for individuals who must be appear at the assessment. Section 38(i) of the Act stipulates that the child must attend his/her assessment. According to Section 38(2) a child's parent, an appropriate adult, or a guardian must be present at the assessment. The aforementioned individuals may be absent from assessment if they have been exempted by a probation officer in terms of Section 38(2)(a)(b) of the Act. Other instances where individuals may be exempted is when such absenteeism will negatively affect their employment. They can be exempted if

²⁵ In terms of Section 34(3) of the Child Justice Act No. 75 of 2008, children under the age of 10 years must be assessed within 7 days after a police official has notified the probation officer that an offence has been committed.

they undermine the assessment process or if it is beneficial to the child and the justice process. Parents who involve a child in criminal activities cannot attend such assessment sessions Gallinetti (2009:39).

It is the responsibility of the probation officer to locate a parent, guardian or an appropriate adult in order to conclude the assessment of the child and may request a police official to assist in the location of that person. "The probation officer may still finalise the assessment of the child despite the nonattendance of a parent, applicable adult or guardian if all practical efforts to locate that person have failed or if that person has been notified of the assessment and has failed to attend" Gallinetti (2009:33). It is evident that a probation officer is responsible for individuals who attend the assessment.

This section dealt with individuals who are compelled to attend assessment. The following section will discuss persons who may attend the assessment.

5.3.4 Persons who may attend the assessment

It is important that parties who participate in the assessment should feel comfortable. However, Section 38(3) provides that a probation officer may permit certain persons to attend an assessment. These persons include a diversion service provider, a researcher and any other person whose presence is necessary or required for the assessment. Although there no specific mention of legal representatives, they are not excluded from attending Gallinetti (2009:33). The following section will explore the role and responsibilities of a probation officer at the assessment.

5.4 FUNDAMENTAL RESPONSIBILITIES OF A PROBATION OFFICER AT THE ASSESSMENT

A probation officer has to fulfil certain responsibilities during assessment. Such responsibilities are provided in Section 39 of the Child Justice Act²⁶. The probation officer explains the intention of the assessment to the child, notifies the child of his/her rights, clarifies to the child the processes to be followed so that the child knows what is going on, and asks whether the child intends to acknowledge responsibility for the offence (Gallinetti,2009:33). The probation officer may privately consult with any person or contact any person who has additional information that is relevant to the assessment. Such people include a prosecutor, police official or diversion service provider. The probation officer should encourage the child's participation in the assessment. When a child is accused together with another child or other children of committing an offence, their assessment must be conducted simultaneously if this will be in the best interests of all the children concerned Gallinetti (2009:33).²⁷ The probation officer has to compile the assessment report for the inquiry magistrate. The contents of the report will be discussed in the following section.

5.4.1. The assessment report of a probation officer

The probation officer's assessment report is crucial for the preliminary inquiry. The preliminary magistrate needs the assessment report in order to make an informed decision in the matter regarding a child. The assessment report is a requirement, as is stipulated in Section 40 of the Child Justice Act No. 75 of 2008. This section requires that a probation officer to complete an assessment report as prescribed and submit the

²⁶ Child Justice Act No. 75 of 2008, Section 39: powers and duties of probation officer at assessment.

²⁷ Child Justice Act stipulates powers and duties of probation officer at assessment in terms of Section 39(1)(2)(3)(4)(5)(6).

report to the prosecutor before the preliminary inquiry. This report must contain recommendations which Gallinetti (2009:33) summarises as follows:

- The information on whether a child can be diverted to a programme and specify which service provider the child should be referred to.
- It should also be stated whether the child can be released. If the child cannot be released, a recommendation regarding placement options must be made.
- The probation officer must also specify whether the matter should be transferred to a children's court. The possible criminal capacity of the child if the child is 10 years or older but younger than 14 years should be determined.
- The report should indicate measures to be taken if the child is under 10 years of age. If there is uncertainty on the child's age, the age must be estimated.

A more detailed report must be submitted if it is needed in cases where the child is a danger to himself or others. A detailed report can be required where there is a possibility to refer the child to a sexual offender's programme. The detailed report may also be required if the child needs medical attention such as injury, severe psychological trauma or mental illness, and if the child has a history of committing offences or absconding. The assessment report must also indicate whether the child is acknowledging responsibility for the offence. This is relevant to determine whether the child is eligible for diversion²⁸. The inquiry magistrate makes use of the assessment report as it provides more in depth information about the child and the crime committed. The following section provides a general idea of the preliminary inquiry and its purpose.

²⁸ Child Justice Act No. 75 of 2008, Section 40(1)(2)(3): assessment report and recommendations by a probation officer.

5.5. THE PRELIMINARY INQUIRY

A preliminary inquiry is a pre-trial procedure, which is inquisitorial in nature. The preliminary magistrate chairs the preliminary inquiry. Section 43(1) of the Act makes provision for a preliminary inquiry to facilitate the management of children in conflict with the law. The preliminary inquiry must be held in court or in any place, which is suitable for that purpose. Gallinetti (2009:33) describes the preliminary inquiry as innovative and in compliance with the obligations prescribed by the UNCRC. (Gallinetti 2009:33) further reinforces that this process is essential in the child's first appearance in court. It is a procedure that seeks to prevent children from getting 'lost' in the system. Section 43(2) of the Child Justice Act stipulates clear objectives for the preliminary inquiry as well as provisions for a set of compulsory decisions to be taken regarding the child. These objectives and guidelines are aimed at assisting role players to establish a consensus on how the matter will be managed from the onset. These objectives are highlighted below:

- Consider the assessment report and recommendations made by the probation officer;
- Establish from the prosecutor whether the matter can be diverted before the plea;
- Identify a suitable diversion option, if applicable;
- Decide whether the matter should be referred to the children's court on account of the child possibly being in need of care and protection;
- Ensure that all relevant information relating to the child is considered when decisions are made regarding diversion or release and detention;
- Ensure that the views of all present are taken into account;
- Encourage the participation of the child and his/her parents, an appropriate adult or a guardian in decisions concerning the child; and
- Determine the release or placement of a child.

These objectives provide a clear mandate for the magistrate who chairs the preliminary inquiry to ensure that all issues are dealt with during the inquiry (Gallinetti, 2009:33). Section 43(3)(a) of the Child Justice Act specifies that every child who is accused of committing an offence must appear at a preliminary inquiry unless the child has already been diverted by a prosecutor, under 10 years of age or the prosecutor has withdrawn the charges against the child. The preliminary inquiry is only attended by required individuals as stated in the Act. These individuals will be mentioned in the next section.

5.5.1. Attendance of the preliminary inquiry

The preliminary inquiry is the opposite of a typical criminal court. Attendance is permitted for individuals who are suggested in the Act. However, a probation officer has powers to decide who should and should not attend the preliminary inquiry. Section 44 of the Child Justice Act stipulates that in addition to the inquiry magistrate, the child, his/her parent, an appropriate adult or a guardian, and the probation officer must attend the preliminary inquiry. The preliminary magistrate must be neutral, more active and involved than is usual in a criminal matter. The inquiry magistrate, who calls for the inquiry, must question and determine whether additional information is necessary to make the required decisions.

However, Section 44(3) of the Child Justice Act makes provision for an inquiry magistrate to excuse any person if it is in the best interests of the child to proceed or if such person's presence is undermining the nature and purposes of the inquiry. It is important to record reasons for such exclusion. In terms of Section 44(4) of the Child Justice Act, the inquiry magistrate may continue with the process in the absence of the child's parent, an appropriate adult, guardian or probation officer and record reasons for such a decision. However, such decisions must be made if the magistrate is satisfied that it is in the best interest of the child. On the contrary, Section 44(5) of the Child

Justice Act also stipulates that the inquiry magistrate must have the authority to allow other persons to attend the inquiry if they have an interest in the matter or they can contribute to the outcome of the inquiry. If a diversion order is likely to be made, a diversion service provider identified by the probation officer should be present.

The principle of confidentiality that applies in the assessment process also applies in the preliminary inquiry. The information obtained through the preliminary inquiry is confidential and cannot be used in any bail application, plea, trial or sentencing proceedings. Information that could reveal the identity of the child cannot be published (Gallinetti 2009:33). If the child's parents, guardian or appropriate adult fails to attend the preliminary inquiry, they may be found guilty of an offence and fined or imprisoned for a period not exceeding 3 months.

Attendance of the preliminary inquiry for those parties who are expected to attend is mandatory; therefore, failure to attend will be in violation of the court order and will be dealt with in accordance with Section 46 of the Child Justice Act.²⁹ Gallinetti (2009:33) further states that the inquiry magistrate may issue a warrant of arrest for a child who has not been detained prior to the preliminary inquiry or fails to attend. Furthermore, when the child appears in court, the inquiry magistrate must establish the reasons for the child's non-appearance in order to determine if it was the child's fault. If it was not the child's fault, the inquiry magistrate can release the child on the same or similar conditions or make an order to assist the child to appear in court. However, where the child is at fault, the court can still release the child on the same or similar conditions or take a decision to detain the child in future.

However, it must be stressed that a preliminary inquiry must be finalised within the prescribed period to avoid unnecessary delays in finalising a child's case. Time allocation for the preliminary inquiry will be discussed in the following section.

²⁹ Child Justice Act, Section 46(a)(b)(c)(d) failure to appear at the preliminary inquiry.

5.5.2. Time allocation for the preliminary inquiry

The preliminary inquiry has time frames. The purpose of time allocations is to avoid unnecessary delays in finalising matters regarding children in conflict with the law. Section 43(3)(b)(i) of the Child Justice Act states that a preliminary inquiry must be held within 48 hours of a child's arrest. If the child has been handed a written notice or served with summons, a preliminary inquiry must be held within the periods as specified in the written notice or summons. The 48-hour rule is mandatory and suggests that regardless of postponement as provided in Section 48 of the Child Justice Act, all the issues must be dealt with as quickly as possible to avoid any unnecessary delays in finalising the child's case. A preliminary inquiry may be postponed for 48 hours to finalise a decision regarding diversion in order to establish the views of the victim on whether the child should be diverted or to find alternatives to detention, to assess the child where no assessment has previously been undertaken or for the purposes of further investigation.

The second postponement is the final postponement of 48 hours, which is permitted only to facilitate diversion. If the preliminary inquiry has not been finalised by this time, the inquiry must be closed and prosecutor must refer the matter to the child justice court. However; Section 48 (4) of the Child Justice Act provides for postponement of up to 14 days upon recommendation by a probation officer for a more detailed assessment of the child (see paragraph 4.3.6, the assessment report of a probation officer) (Gallinetti, 2009:33). The preliminary inquiry is a platform where decisions are made regarding the child. A number of instructions on the way forward are issued. These will be dealt with in the following section.

5.5.3. Directives issued at the preliminary inquiry

The inquiry magistrate may issue orders at the preliminary inquiry as stipulated in Section 49 (1)(2) of the Child Justice Act. Firstly, a diversion order is made if the child is diverted in terms of Section 52(5) of the Child Justice Act, where the prosecutor or a Director of Public Prosecutions gives an indication that the matter can be diverted. However, if the child is 10 years or older, but under 14 years of age, the inquiry magistrate must first be satisfied that the child has criminal capacity.

Secondly, an inquiry magistrate may make an order that the matter be referred to the child justice court for plea and trial. If such an order is made, the inquiry magistrate must refer the child to the Legal Aid Board for legal representation if the child does not already have a legal representative. If the child is in detention, the inquiry magistrate must inform the child of the charge against him/her and the date when he/she must appear in the child justice court. The inquiry magistrate must also inform the child's parents, guardian or appropriate adult to be at the next appearance. If the child is not in detention, the inquiry magistrate may extend any condition of release and must warn the child, the child's parents, guardian or appropriate adult when to appear at the child justice court³⁰ (Gallinetti 2009:33). In addition to the mentioned responsibilities, the inquiry magistrate has to perform the following duties at the preliminary inquiry as discussed in the next section.

5.5.4. Duties of the Inquiry Magistrate at the Preliminary Inquiry

Gallinetti (2009:33) asserts that the magistrate plays a key role at the preliminary inquiry by critically analysing and evaluating all the information from all role players. The inquiry magistrate is required to make an informed and objective decision in the best interest of

³⁰ Child Justice Act, Section 49(1)(a)(b); Section 49(2)(a)(b)(c)(i)(ii): orders at preliminary inquiry:

the child. Section 47(1) of the Child Justice Act provides powers to the inquiry magistrate to conduct the preliminary inquiry. This information was discussed in paragraph 4.4 of this study. The purpose of the inquiry is to obtain as much information as possible. It is very important to keep record of the proceedings. The responsibilities of the inquiry magistrate are listed below as stipulated in terms of Section 47 of the Child Justice Act:

- Explain the purpose and inquisitorial nature of the preliminary inquiry to the child.
- Inform the child of the nature of the allegations against him/her.
- Inform the child of his/her rights.
- Explain to the child the immediate procedures to be followed in terms of this Act.
- Determine whether the child admits responsibility for the offence.
- Consider the probation officer's report.
- Consider any documents or information relating to the determination of the child's age.
- Consider any documentation relating to a previous diversion, conviction, unless the child does not admit responsibility for the offence or other pending charges.
- Consider the probation officer's report regarding detention of the child.
- Request any further documentation relevant to the preliminary inquiry.
- Take necessary steps to establish the truth of any statement or correctness of any submission made by any person present.
- Encourage the participation of the child, child's parents, guardian or appropriate adult by allowing them to ask questions and raise relevant issues.
- Hold a joint preliminary inquiry if more than one child is accused in the same case, provided it is in their best interests.
- If the prosecutor declines to divert the child, obtain confirmation from the prosecutor that there is sufficient evidence to proceed or that a further investigation will yield that evidence, and inform the child that the matter is being referred to the child justice court.

- Recuse him/herself from any other proceedings or trial if he/she has heard information prejudicial to the child. If it appears that the child is in need of care and protection, does not live at home or in alternative care or alleged to have committed minor offences to get food or warmth, the inquiry magistrate could possibly stop proceedings and refer the matter to the children's court (Gallinetti 2009:33).

There various elements to be considered before reaching a final decision on the fate of the child. However, objectivity and focusing on what is the best for the child is key.

5.6. CONCLUSION

The role of a probation officer is without a doubt indispensable within the child justice, both internationally and in South Africa. The Probation Services Amendment Act No. 35 of 2002 and the Child Justice Act No. 75 of 2008 provide clear guiding principles for the role of a probation officer. The Child Justice Act No. 75 of 2008 has further incorporated systematic guidelines for every activity that the probation officer has to undertake when dealing with children accused of committing crimes. These guidelines and procedures simplify the role of a probation officer, thus avoiding role ambiguity among role players. It is also important that a probation officer should be a team player whose basic objective being the best interest of the child. The assessment of a child forms part of the most crucial element of the probation officer's role. The assessment report enables the inquiry magistrate to make an informed decision on the fate of the child. In addition to the assessment of a child, the probation officer is required to ensure that all the individuals who are supposed to attend the preliminary enquiry do attend. Skills and attributes, which a probation officer possesses, become essential when interacting with the child, parents and other role players.

CHAPTER 6: CONCLUSION

The study explored national and international developments that contributed to the improved treatment of children in conflict with the law. Significant developments within the global criminal justice system brought about a separate juvenile justice system that caters for the needs of youth offenders. The ratification of the United Nations Convention on 16 June 1995 obliges state parties to review their laws to protect the rights of children³¹. The UNCRC is the only UN human rights instrument with ratification from all countries except for the United States of America and Somalia.³²

The UNCRC requires state parties to establish laws which cater for the needs of children in conflict with the law.³³ In addition to the UNCRC, a number of international instruments contributed towards bringing about positive change in the lives of youth offenders. Such instruments include the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), the UN Standard Minimum Rules for the Administration of Juvenile Justice (JDLs), the UN Standard Minimum Rules for the Protection of Juveniles Deprived of their Liberty, and the African Charter on the Rights and Welfare of the Child. These instruments provide guidelines, in line with the UNCRC,³⁴ to countries on the treatment of children in conflict with the law. The Constitution of the Republic of South Africa is the most significant milestone in

³¹ Article 3 (1)(2)(3) of the United Convention on the Rights of the Child which enforces the best interests of the child being of paramount importance in all actions undertaken by all institutions, courts of law, administrative authorities and legislative bodies.

³² Tiwari (2011:17) and Trodes *et al* (2006:3) highlight that the United Convention on the Rights of the Child, being the most widely ratified international human rights treaty with the exception of the United States of America and Somalia.

³³ Article 40(1)(2)(3) of the UNCRC states that a child who is alleged or accused of crime or having infringed a penal law, must be treated in a manner that promotes a child's sense of dignity and worth, which reinforces the child's respect for human rights and fundamental freedoms of others, which takes into account the child's age, and encourages a child to assume a constructive role in society.

³⁴ Child Justice in South Africa (Skelton & Tshehla, 2008)

reinforcing the aims of the United Nations on the Rights of the Child. The South African Constitution has dedicated Section 28 to the protection of the rights of children in conflict with the law³⁵. Among these rights is the detention of a child as a measure of last resort. Such detention must be only for the shortest appropriate period. This section also emphasises that the best interest of the child must be of paramount importance. Section 35 provides for the protection of all arrested, detained and accused persons including children³⁶. The Constitution of the Republic of South Africa is explicit in the guidelines pertaining to both Sections 28 and 35. Further developments in South Africa include the Child Justice Act No. 75 of 2008.

In its preamble, it is stipulated that the aims of the Child Justice Act No. 75 of 2008 are to establish a criminal justice system for children in conflict with the law “in accordance with the values underpinning the Constitution of the Republic of South Africa and the international obligations.”³⁷ Furthermore, the Act embraces restorative justice principles, ensuring that children are responsible and accountable to the crimes committed, while also embracing a possibility of diverting children from the criminal justice system and promoting crime prevention strategies (Gallinetti, 2009:12). Central to the diversion process is the probation officer, who is entrusted with duty to assess every child shortly after being apprehended by police as stipulated in chapter 5 of the Child Justice Act. This chapter stipulates the duties and responsibilities of a probation officer on the assessment of every child alleged to have committed an offence throughout the process until the child is either diverted or sentenced³⁸. Other significant key role players in the

³⁵ The Constitution of the Republic of South Africa, Section 28: the right not to be detained except as a measure of last resort and for the shortest appropriate period of time; the right, when detained, to be kept separately from persons over the age of 18; and the right, when detained, to be treated in a manner and kept in conditions that take account of the child’s age.

³⁶ The Constitution of the Republic of South Africa, Section 35: the rights of arrested, detained and accused persons.

³⁷ Child Justice Act 75 of 2008, preamble (page 1).

³⁸ Child Justice Act 75 of 2008 (chapter 5, assessment of a child).

child justice process are the prosecutor and preliminary inquiry magistrate³⁹. However, a probation officer's assessment report is the most crucial element which enables the prosecutor and the magistrate to make an informed decision on whether to divert a child or not.

The 2013/2014 annual report from the Department of Justice and Constitutional Development indicates that there is a decrease in the number of imprisonment sentences imposed upon children. During the period 2010/2011 to 2013/2014, imprisonment sentences imposed upon children decreased from 536 to 49. This drastic change indicates that the courts are, without a doubt, effective in achieving the goals of the Child Justice Act. Given the enormous duties and responsibilities which the probation officer has to fulfil during this process, as outlined in chapters 4 and 5 of this study, the following recommendations are made:

6.1. Increase capacity of probation officers

Increasing the capacity of probation officers will enable them to fulfil their responsibilities as stipulated in the Child Justice Act 75 of 2008. Sibisi (2015:2) states that expectation is that the probation officers should carry out their responsibilities effectively in order to address child offending in the country. It is also imperative to note that probation officers offer a variety of social services to children in conflict with the law. Their duties start from the initial assessment of the child within 48 hours of apprehension to monitoring of diversion orders and submission of assessment and pre-sentence reports. They are also expected to avail themselves when needed after hours. This leads to enormous challenges on the high caseloads. Gxubane (2008) argues that, while it is essential for probation officers to provide support services to the courts, it is equally important that they are also involved in the overall developmental mandate of the country relating to

³⁹ Child Justice Act 75 of 2008, Chapter 6, Sections 41 and 42: diversion by the prosecutor before preliminary inquiry in respect of minor offences. Chapter 7, Sections 43-50: A preliminary inquiry conducted by An Inquiry Magistrate.

crime prevention. Essentially, probation officers have a significant role to play in transforming the child justice system since they are central to the administration of child justice.

6.2. Training of SAPS officials on the Child Justice Act 75 of 2008

SAPS officials play a crucial role in the implementation of the Child Justice Act. Since its promulgation, issues relating to training and diversion pose problems to its effectiveness. According to the African Policing Civilian Oversight Forum (2016:13), there is a slight decline in the number of SAPS officials who receive training on the Child Justice Act. The report indicates that during the first financial year (2010/11) of the implementation of the Child Justice Act, 15 891 members were trained. Whereas during 2014/2015 financial year, a mere 4 422 members received training. Compared to the actual number of SAPS officials, this figure is alarming. The year 2014/15 was serviced by 157 518 SAPS officials. This figure indicates that only 3% of police officials were trained on provisions of the Child Justice Act during that period⁴⁰. This is very worrying given the fact that the police are the first point of entry when a child is accused of committing a crime. It is, therefore, critical that police receive adequate and ongoing training regarding their responsibilities in the Child Justice Act.

Muthaphuli (2012:3) reiterates that the performance of the police also affects other components of the criminal justice system. Furthermore, proficient police officials will assist other role players in making informed decisions regarding the fate of a child. A competent police official will enable the probation officer to be more efficient and effective in the implementation of the Child Justice Act.

⁴⁰ African Policing Civilian Oversight Forum (AFCOF) Alternative Report Submission to the Human Rights Committee in Response to South Africa's Initial Report and Replies to the list of issues under the International Covenant on Civil and Political Rights (March 2016).

6.3. Vigorous Implementation of Crime Prevention Strategies

The reality is that the level of crime, especially violent crimes, in South Africa is increasing every day. Sibisi (2012:7) accentuates that the public perceive crime and violence as one of the primary challenges facing South Africa. Most children in conflict with the law commit crimes because of individual, family and societal factors. Hence, the role of a probation officer becomes very crucial under these circumstances. Muthaphuli (2012:6) suggests that the criminal justice system lacks the capacity to develop innovative interventions and solutions towards crime prevention. While Thomson (2016:72) further states that there is a link between poverty and delinquency, where, in most cases, areas of economic deprivation suffer from the worst rates of crime. Furthermore, child poverty remains high in South Africa, where two-thirds of children live in households with monthly income of less than R1 200. Therefore, it is not surprising that youth crime is ever increasing.

Muthaphuli (2012:7) further suggests that policy makers need to embark on interventions that produce positive results within a short period. Crime in South Africa is rated as one of the highest in the world. During the 2010/2011 financial year, approximately 2.1 million serious crimes were reported in South Africa. The public's involvement in the fight against crime and new innovative changes to community policing is imperative (Muthaphuli, 2012:1). Thomson (2016:72) contends that South Africa has implemented a significant number of prevention strategies and policies. Furthermore, it has committed to facilitate change; however, the continuation of the same socio-economic problems in society show that current strategies fall short of addressing these problems. The report on the National Crime Prevention Strategy (2017) reiterates views expressed by Muthaphuli (2012) in that crime prevention requires an integrated and multi-agency approach. Therefore, one sector of government, or even government alone, cannot win the war against crime. It is of importance that all relevant departments view crime prevention as a shared responsibility and collective priority. The recommendation on a multi-disciplinary and

multi-agency approach is supported fully. However, every initiative or approach requires commitment and vigorous action that will yield results.

6.4. Ongoing support for children who have already completed diversion programmes

During 2013/2014 financial year, the Department of Justice and Constitutional Development made a commendable contribution to society. Among these are the robust public education initiatives that government has successfully received, and continues to receive, regarding the support of parents, guardians and the civil society in the re-integration of children back into their communities. “The Department has also dedicated budget for the execution of its annual programme of action in public education and has succeeded to reach more than 36 540 people”. However, the same support for children who have already completed the diversion programme is further encouraged. The prosecutor and the pre-trial magistrate specify the duration for which a child must be diverted. This time period is based on the level and the schedule of the offence as prescribed by the Child Justice Act.⁴¹ A continuous follow up on the child’s progress after completion of the diversion programme is ideal. This recommendation is based on the notion that on completion of the programme, the child still needs support and motivation. The reality is that young people are faced with innumerable challenges and temptations in the communities. Therefore, the occasional presence of a probation officer from time to time will encourage the child to become a better person in future. Investing human and financial resources in a child today can be rewarding in the future.

⁴¹ Child Justice Act 75 of 2008, Sections 53 and 54: diversion options and time periods.

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ANNEXURE 1: COLLEGE OF LAW RESEARCH ETHICS REVIEW COMMITTEE



COLLEGE OF LAW RESEARCH ETHICS REVIEW COMMITTEE

Date: 2013/03/31

Reference: ST 41

Applicant: C. Dlamalala

Dear C. Dlamalala

DECISION: ETHICS APPROVAL

Name	C. Dlamalala
Proposal	The role of a probation officer in the diversion process: a penological perspective
Qualification	Mtech Corrections Management

Thank you for the application for research ethics clearance by the College of Law Research Ethics Review Committee for the above mentioned research. **Final approval is granted.**

The application was reviewed in compliance with the Unisa Policy on Research Ethics.

The proposed research may now commence with the proviso that:

1. *The researcher will ensure that the research project adheres to the values and principles expressed in the Unisa Policy on Research Ethics which can be found at the following website:*

http://www.unisa.ac.za/cmsys/staff/contents/departments/res_policies/docs/Policy_Research%20Ethics_rev%20app%20Council_22.06.2012.pdf

2. *Any adverse circumstances arising in the undertaking of the research project that is relevant to the ethicality of the study, as well as changes in the methodology, should be communicated in writing to the College of Law Ethical Review Committee.*



University of South Africa
Pretorius Street, Muckleneuk Ridge, City of Tshwane
PO Box 392, Unisa 0003, South Africa
www.unisa.ac.za/law

	<p>An amended application could be requested if there are substantial changes from the existing proposal, especially if those changes affect any of the study-related risks for the research participants.</p>		
3.	<p>The researcher will ensure that the research project adheres to any applicable national legislation, professional codes of conduct, institutional guidelines and scientific standards relevant to the specific field of study.</p>		
	<p>Note:</p>		
	<p>The reference number (top right corner of this communique) should be clearly indicated on all forms of communication (e.g. Webmail, E-mail messages, letters) with the intended research participants as well as with the URERC.</p>		
	<p>Kind regards</p>		
	<table> <tr> <td data-bbox="443 533 798 680"> <hr/> <p>PROF BW HAEFELE CHAIR PERSON: RESEARCH ETHICS REVIEW COMMITTEE COLLEGE OF LAW</p> </td><td data-bbox="798 533 1248 680"> <hr/> <p>PROF S SONGCA EXECUTIVE DEAN: COLLEGE OF LAW</p> </td></tr> </table>	<hr/> <p>PROF BW HAEFELE CHAIR PERSON: RESEARCH ETHICS REVIEW COMMITTEE COLLEGE OF LAW</p>	<hr/> <p>PROF S SONGCA EXECUTIVE DEAN: COLLEGE OF LAW</p>
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ANNEXURE 2: EDITOR'S CERTIFICATE

EDITING AND PROOFREADING CERTIFICATE

7542 Galangal Street

Lotus Gardens

Pretoria

0008

26 November 2017

TO WHOM IT MAY CONCERN

This letter serves to confirm that I have edited and proofread Ms CN Dlamalala's dissertation entitled: **THE ROLE OF A PROBATION OFFICER IN THE DIVERSION OF CHILDREN FROM THE CRIMINAL JUSTICE SYSTEM: A PENOLOGICAL PERSPECTIVE."**

I found the work intriguing and enjoyable to read. Much of my editing basically dealt with obstructionist technical aspects of language which could have otherwise compromised smooth reading as well as the sense of the information being conveyed. I hope that the work will be found to be of an acceptable standard. I am a member of Professional Editors' Guild.

Hereunder are my particulars:

Jack Chokwe (Mr)

Contact numbers: 072 214 5489 / 012 429 3327

jackchokwe@gmail.com

Professional
EDITORS 
Guild

ANNEXURE 3: TURNITIN REPORT



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THE ROLE OF A PROBATION OFFICER IN DIVERSION OF CHILDREN FROM THE
CRIMINAL JUSTICE SYSTEM: A PENOLOGICAL PERSPECTIVE

By

CYNTHIA NKOSAZANA DLAMALALA

submitted in accordance with the requirements
for the degree of

MASTERS OF ARTS

in the subject

CORRECTIONS MANAGEMENT

at the

UNIVERSITY OF SOUTH AFRICA

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January 2018

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